

89- 13860

Supreme Court, U.S.
FILED

FEB 27 1990

JOSEPH F. SPANIOLO, JR.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

RITA IRIS FISHMAN, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE THIRTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS AND TO THE
TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

February 27, 1990

QUESTIONS PRESENTED FOR REVIEW

First: While all Texas residents have state statutory and state constitutional homestead rights to keep creditors from forcing the sale of the debtor's urban homestead, Petitioner was unlawfully denied those homestead rights in the 13th court of appeals' opinion and resulting judgment in violation of Petitioner's right to equal protection under the Fourteenth Amendment to the U.S. Constitution.

Second: The 13th court of appeals reversibly erred in agreeing (Pet. App. 5-6) with the State's contention that the record does not affirmatively show that the trial court abused its discretion in finding that Petitioner was not indigent.

Third: The 13th Court of Appeals reversibly erred and denied Petitioner the federally guaranteed constitutional due process rights before and after that Court rendered its opinion, by denying Fishman's

motions to abate appeal (Pet.App. 41-44, and 49-60).

Fourth: On September 26, 1989, the Texas Court of Criminal Appeals reversibly erred in denying Petitioner's September 1989 motion to abate appeal and to remand the cause to the district court, since conditions have so changed while this cause was on appeal.

Fifth: On September 26, 1989, the Texas Court of Criminal Appeals reversibly erred in denying appellant's September 1989 motion to supplement information concerning both appellant's p.d.r. and her current expenses and changed conditions now that there has been a cessation of all income (government benefits) to support appellant and her child.



LIST OF ALL PARTIES BELOW

The original parties before the 13th Court of Appeals were: The State of Texas and Petitioner Rita Iris Fishman.

STATEMENT OF RELATED CASES
AND PROCEEDINGS

This case has not previously come before this Court. Petitioners' undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner was represented at trial by attorney Thomas Sullivan and at the Court of Appeals by attorneys Joseph A. Connors III, Thomas Sullivan and William E. Owen.



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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

RITA IRIS FISHMAN, Petitioner,

v.

THE STATE OF TEXAS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE THIRTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS AND
TO THE TEXAS COURT OF CRIMINAL APPEALS

To the Honorable Supreme Court:

RITA IRIS FISHMAN petitions for review
of the judgment, opinion and rehearing
denial of the Court of Appeals for the
Thirteenth Supreme Judicial District of
Texas and for review of the Texas Court of
Criminal Appeals' rehearing denial and
refusal of petition for discretionary
review.

OPINIONS BELOW

Unreported is the district court's
judgment (Pet.App. 16-24). Reported are the

Court of Appeals' opinion and rehearing denial (Pet.App. 4-14, 59-60). Fishman v. State, 771 S.W.2d 573 (Tex.App.--Corpus Christi 1989, petition refused). Unreported are the Texas Court of Criminal Appeals' refusal of petitioner's petition for discretionary review and rehearing denial (Pet. App. 86, 84).

JURISDICTION

The Texas Court of Appeals entered its judgment and opinion on April 20, 1989 (Pet.App. 3-14). That Court denied Fishman's timely amended petition for rehearing on June 6, 1989 (Pet.App. 59-60). The Texas Court of Criminal Appeals refused Fishman's petition for discretionary review on October 25, 1989 (Pet. App. 86), and denied Fishman's motion for rehearing on November 29, 1989, with the notation "JUDGES CLINTON & TEAGUE WOULD GRANT ON NO. 1" (Pet.App. 84). Within the 90 day period following November 29, 1989, this petition

was mailed for filing by the Clerk of this Court. Supreme Court Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT RULE

Texas Rule of Appellate Procedure 53(j) provides:

(1) Civil Cases. In any case where the appellant has filed the affidavit required by Rule 40 to appeal his case without bond, and no contest is filed, or any contest is overruled, the court or judge upon application of appellant shall order



the official reporter to prepare a statement of facts, and to deliver it to appellant, but the court reporter shall receive no pay for same.

(2) Criminal Cases. Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge. After hearing the motion, if the court finds the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, and when the court certifies that the statement of facts has been furnished to the appellant, the court reporter shall be paid from the general funds of the county, by the county in which the offense was committed the sum set by the trial judge.

Texas Rules of Appellate Procedure 53(m)

reads:

When no statement of facts Filed in Appeals of Criminal Cases. If the clerk of the appellate court does not receive a statement of facts when due, he shall notify the trial judge and the appellant's attorney, if the appellant's attorney can be determined from the transcript, that a statement of facts has not been filed and that in the absence of a statement of facts the appeal will be submitted on the transcript alone. If no statement of facts has been filed, the

appellate court may order the trial court to hold a hearing to determine whether the appellant has been deprived of a statement of facts because of ineffective counsel or for any other reason, to make findings of fact and conclusions of law, to appoint counsel if necessary, and to transmit to the appellate court the record of the hearing. The appellate court may order a late filing of statement of facts.

STATEMENT OF THE CASE

A. Procedural History In The Appeals Courts

In an opinion ordered to be published on April 20, 1989, the 13th Court of Appeals affirmed the trial court's April 21, 1988 judgment of conviction and sentence against appellant (Pet.App. 4-14). Appellant's timely amended motion for rehearing was filed with leave of the 13th Court on May 19, 1989 and was overruled on June 8, 1989 (Pet.App. 59-60). Petitioner timely filed her Petition For Discretionary Review. That petition was refused by the Texas Court of Criminal appeals in its cause number 1085-89 on October 29, 1989 (Pet.App. 86).



Appellants timely motion for rehearing was denied by the Texas Court of Criminal appeals on November 29, 1989 (Pet.App. 84).

B. Procedural History in the District Court

This appeal stems from a felony conviction in cause no. 88-CR-87-E in the 357th Judicial District Court of Cameron County, Texas. Appellant had pled not guilty but was convicted by a jury of a murder offense committed in violation of V.T.C.A. Penal Code, Section 19.02(a)(1) and (2) (1979). The indictment's allegations were incorporated into the COURT'S CHARGE TO THE JURY in its paragraph 5, which read (R. I-111-112):

Now, if you find from the evidence beyond a reasonable doubt that on or about the 6th day of June, 1981 in Cameron County, Texas, the defendant, Rita Iris Fishman, did intentionally or knowingly cause the death of Samuel Richard Fishman by shooting him with a firearm, or did then and there intend to cause serious bodily injury to the said

Samuel Richard Fishman and with said intent to cause such serious bodily injury did commit an act clearly dangerous to human life, to wit, shooting the said Samuel Richard Fishman with a firearm, and did, in either event, thereby cause the death of the said Samuel Richard Fishman, as alleged in the indictment, and that the defendant, in so acting, was not acting under the immediate influence of sudden passion arising from an adequate cause, then you will find the defendant guilty of murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of murder.

On March 30, 1988, the indictment was read to the jury and appellant entered her plea of not guilty (R. I-130). On April 6, 1988, the jury returned its verdict of guilty, which read: "We, the Jury, find the Defendant, RITA IRIS FISHMAN GUILTY OF MURDER AS CHARGED IN THE INDICTMENT" (Pet.App. 19-20; R. I-119, 131-132). On April 6, 1988, the jury assessed appellant's punishment at confinement in the Texas Department of Corrections for 10 years

(Pet.App. 20-22; R. I-109, 132-133). The district court pronounced oral sentence on April 6, 1988 and signed the written judgment on April 21, 1988 (Pet.App. 17, 22-24; R. I-7, 130-134). Appellant's notices of appeal were timely filed on both April 8, 1988 and May 20, 1988 (R. I-128-129, 158). Appellant's motion for new trial was timely filed on May 5, 1988 (Pet.App. 34-40; R. I-136-141) but denied after a hearing on May 20, 1988 (R. I-8, 9). On May 26, 1988, the district court signed an order granting appellant's designations of both evidence and transcript on appeal (R. I-9, 154, 159). On August 4, 1988, the district court denied appellant's June 23, 1988 affidavit of indigency. (Pet.App. 28, 25; R. SI-10, 65; SI is an abbreviation for the supplemental transcript volume, which was filed at the Court of Appeals on October 13, 1988). Then on August 12, 1988, appellant filed her additional notice of



appeal on issue of indigency and request for indigency proceedings' record (R. SI-52).

C. Appeal Issues Concerning The Jury Trial

Once a full appellate record is obtained through this "interim appeal", appellant presently desires to raise on her subsequent "merits appeal" at least all the issues contained in appellant's motion for new trial (Pet.App. 34-40; R. I- 136-140).

D. August 4, 1988 Summation By District Court And Counsel

After the close of the indigence evidence, this colloquy followed (R. II-23-29):

MR. SULLIVAN: This is all we have, sir.

THE COURT: Any questions of this witness?

MR. LARA: No, your Honor.

THE COURT: Okay.

MR. SULLIVAN: Nothing further.

THE COURT: You rest?

MR. SULLIVAN: Yes, sir.

MR. LARA: We have no evidence, your Honor.

(Whereupon official court reporter Cynthia L. Garza proceeded to report the following proceedings.)

THE COURT: Okay? Any arguments?

MR. CONNORS: Judge, if I could, I gave Mr. Ponce earlier this morning a copy of this case and you were busy and I didn't give it to you. But for the record, it's Abner versus State of the Court of Criminal Appeals, dated June 11, 1986. And it's found at 712 Southwestern Second, page 136.

In that case, it was litigated of whether or not Mr. Abner, an adult male, was indigent or not, your Honor, and his dad was the guardian that testified. The court reporter testified, income tax returns were placed in evidence, he had a net worth of, Mr. Abner, his daddy, as I understand from my friend in the Dallas area, was somewhat wealthy, but the court said we don't look to the dad's wealth; we look to the defendant's wealth. And this defendant had a net worth and cannot buy a record and the trial judge abused his discretion and was wrong when he ordered, found the defendant not indigent on a theory that, well, dad can pay for it.

And the Dallas Court of Appeals accepted that theory of the trial



judge and that was reversed on appeal. We don't look to relatives unless the relatives have a legal duty to come forward. We have to exclude the relatives. We exclude the fact that retained counsel is representing the person and we look to her assets at this time today and see if she is poor.

And I think that you have heard that she is poor and she is entitled to the county buy the record for her, but I ask you to look at this if you have any question on that because that's the law.

THE COURT: I will go further. I agree, Counsel, with you and I'm not going to look at the relatives for, you now, consideration in making that. I will look at the assets, presently.

Mr. Lara?

BY MR. LARA: I'd like to bring to the Court's attention, your Honor, under the new rules of appellate procedure, which includes the repeal statute and that includes the one that makes reference to the case of Abner. It's no longer the law. The new provision is under rule 54 of the rules of appellate procedure at page 325 in the book, Abner therein includes a new position that the Court has taken in relation to it talks about after hearing the motion of the Court finding the appellant is unable to pay for or it gives security.



And I think maybe that's something that hasn't been discussed here.

THE COURT: Or what?

MR. LARA: Or gives security. It's at page 325 of our Code of Criminal Procedure handbook, Judge.

THE COURT: I've got it here, 325.

MR. LARA: And although we discussed that she is, I'm not sure we want to get into, well -- I don't, I don't think that's necessarily the issue. They talk about the fact that if she, in fact, does not have the money to pay for the transcript of the statement of facts that the Court should look also into whether or not she can give security. And there was testimony today that she owns some property, 40 thousand dollars worth and some additional lots and also have an interest in the property that used to belong to her husband.

But there was not testimony in relation to whether or not she would have been able to put that up as security. I think if that is available, maybe that might be one way of the Court alleviating it having to have the county pay for the transcript.

MR. SULLIVAN: Excuse me, your Honor.

THE COURT: Yes, sir.



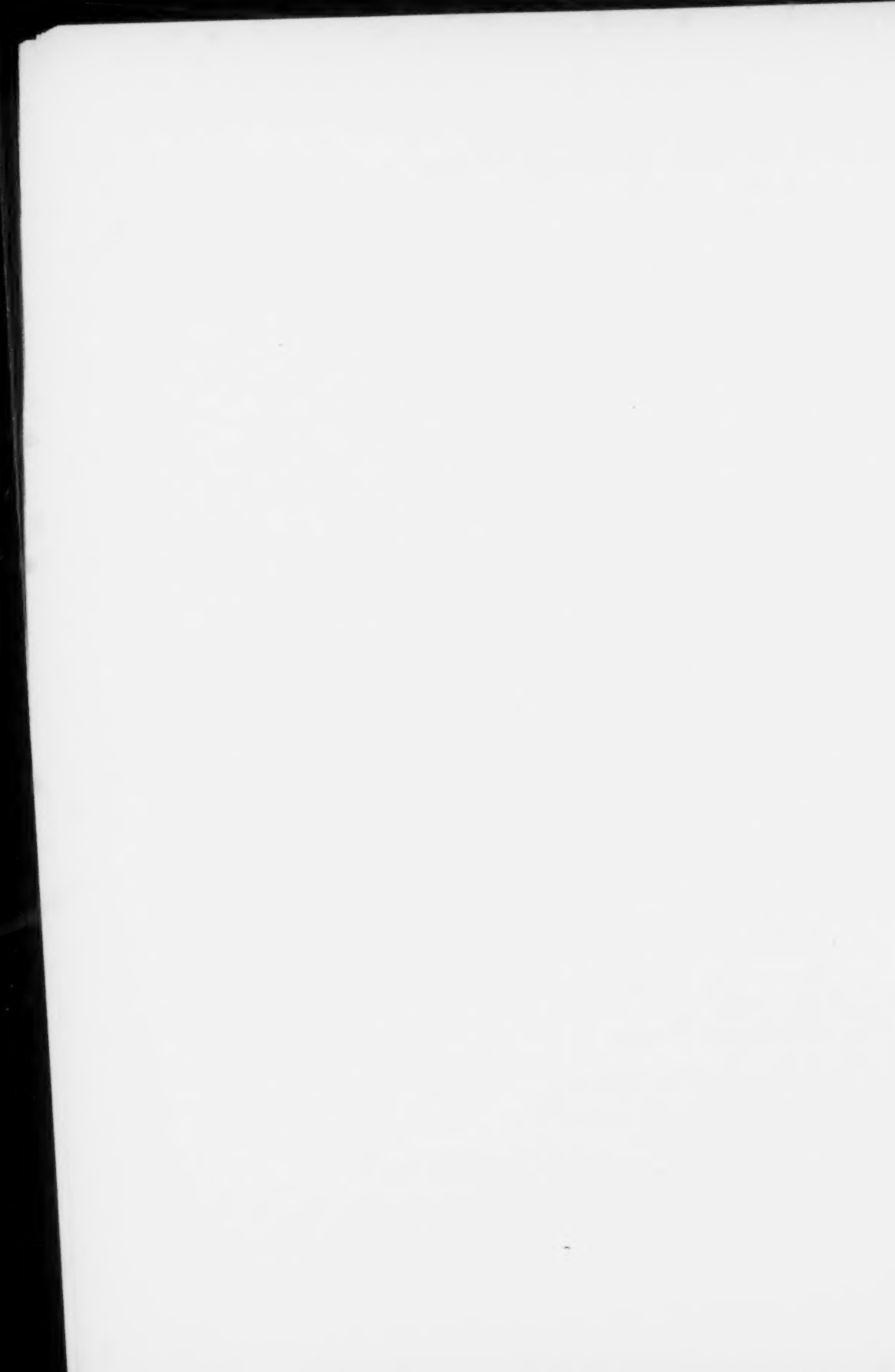
MR. SULLIVAN: Your Honor, Mr. Vela's testimony was that the homestead, the house and the additional lot are together valued at, I mean, Rita's share of that is valued at 40 thousand, approximately 42 thousand dollars. That includes the improvements on the real estate. And I think the submission or sworn submission to the Court both in this case and to the probate court downstairs, indicates that that is her share of the value of the homestead and the additional lot. The debt on that 40 thousand dollars, her share is 13 thousand dollars which gives her a net worth of approximately 33, well, 13 from 42, that comes to 20 thousand dollars.

In addition to that 20 thousand dollars, sir, she has 40 thousand dollars that she owes to her child's estate and a hundred and some thousand dollars that she owes to the family, her paternal grandparents of her child, her former in-laws. And so her net worth, the arithmetic of the net worth is 140 thousand dollars minus 20, you know, using round figures, so she's -- and if that lot, additional lot --

THE COURT: Are those homestead, Counsel?

MR. SULLIVAN: Excuse me?

THE COURT: Lot and house are homestead?



MR. SULLIVAN: Well, we don't know. The homestead certainly is homestead, the lot is adjacent to it and could certainly be argued to be. It could be argued to be homestead. It's a total of about three acres. So -- but the lot, the lot that we are talking about is an undeveloped piece of property.

THE COURT: Okay.

MR. SULLIVAN: Most of the asset, obviously, is in the home.

THE COURT: Okay.

MR. LARA: There was some reference made to the fact that she does owe these other debts. There has been not effort to pay a cent out of any of those judgments and I don't think the fact that she has this pending litigation hanging over her head and there is a necessity for a transcript so that she can appeal it will mean that she is going to pay any of the other stuff either, Judge.

I think her priorities are set in this criminal case and she wants to take care of this. For that reason, I think that's where the money is going to go.

MR. SULLIVAN: Your Honor, the outstanding judgments, sir, are there.

THE COURT: Do you know they can be satisfied and --

MR. SULLIVAN: She ought not to have to sell her house in order to buy a transcript.

THE COURT: Let the record show that based on the evidence that I have heard, the Court finds that Ms. Fishman is not indigent at this time, that she can, has the disposal of sufficient sums of money to obtain her own transcript. Those are the findings of this Court.

MR. LARA: Your Honor, may we have the additional finding that at this particular hearing even at the prior hearing, Ms. Fishman has employed counsel, that both attorneys are present and representing her, both Mr. Joseph Connors and Mr. Thomas Sullivan?

THE COURT: Yes, sir. Those will be the findings of this Court. Submit an order to that effect, Counsel.

MR. SULLIVAN: Yes, sir.

MR. LARA: Thank you, Your Honor.

(End of proceedings).

E. Statement of the Facts: State's Case

The prosecutor presented no live or documentary evidence but did point out appellant not only failed to discuss if appellant was unable to give security or put

up property as security to alleviate the district court from having to have the county pay for the record but also obtained a district court finding that at this indigence hearing and at the prior hearing (for new trial), appellant had present and representing her two employed counsel, "both Mr. Joseph Connors and Mr. Thomas Sullivan." (R. II-25-26, 28-29).

F. Statement of the Facts: Defense's Case

On July 8, 1988, appellant filed her motion to have the court consider court documents as evidence in hearing on indigency (R. SI-20). To that motion, appellant attached numerous certified copies of public records of court documents from cause no. 22,582-A pending in the County Court at Law No. 1 of Cameron County, Texas under the style of "Estate of Amy Michelle Fishman, a minor" (R. SI-22-49).

On August 4, 1988, the district court conducted a hearing to determine appellant's



alleged status as an indigent for purposes of obtaining a free record for appeal (R. II-2). Defense counsel offered into evidence (R. II-2, 3) appellant's affidavit of indigency (Pet. App. 25-26; R. SI-10) and the public records from the guardianship, which included financial records of appellant and her daughter Amy Michelle Fishman and both Amy and appellant's individual 1987 tax returns (R. SI-22-49). The district court took judicial notice of all matters that had been filed of record with the court (R. II-3,4).

Ms. Cynthia L. Garza, official court reporter for the 357th District Court of Cameron County, Texas, testified that she was the court reporter responsible for the preparation of the Statement of Facts in the case presently before the Court. She estimated the statement of facts consisting of all pre-trial hearings, trial and the Bill of Exception would comprise 1600 to



2000 pages at the usual costs of \$3.50 per page. Ms. Garza quoted a total fee of approximately \$9,000.00 (R. II-21-23).

Carlos Vela testified he is the attorney from Harlingen, Texas, who had been appointed by Probate Judge Noe Robles on April 11, 1988, to serve as the temporary guardian of the estate of Amy Fishman in cause no. 22,582-A entitled "In re: the Estate of Amy Fishman, a minor" (R. II-6-11). Amy is the minor child of Rita Fishman and the deceased, Sam Fishman.

Defendant's Exhibit No. 1 (hereinafter DE#1) was filed below (Pet. App. 31-33; R. SSI-2-3; SSI is an abbreviation for the second supplemental transcript volume). DE#1 is the order resulting after the July 21, 1988 probate court hearing regarding the permanent guardianship of the estate of Amy Fishman. DE#1 reads (Pet.App. 31-33; SSI-2-3):



Cause No. 22-582-A

ESTATE OF § ON THE COUNTY COURT

AMY MICHELLE § AT LAW NO. 1
FISHMAN,

A MINOR § CAMERON COUNTY, TEXAS

ORDER APPOINTING PERMANENT GUARDIAN

On the 21st day of July, 1988, a hearing was held for the appointment of a permanent Guardian of the Person and of the Estate of Amy Michelle Fishman, a minor; and personally appeared Carlos F. Vela, Temporary Guardian of the Estate, the Department of Health and Resources, the Temporary Guardian of the Person and Rita I. Fishman, in person and, by and through her attorney and announced ready; the Court found that it had jurisdiction and venue over this matter and after hearing the evidence and the argument of counsel, the court was of the opinion and made the following Orders:

It is therefore ORDERED that Rita I. Fishman be and is hereby appointed Permanent Guardian of the Person Amy Michelle Fishman, a minor. It is further ORDERED that no bond will be required from said Guardian.

The court does however, find that the said Rita I. Fishman has used monies from the estate of said child for personal expenses which were the obligation of the natural parent of said child and hereby orders reimbursment (sic) of said expenses by Rita I. Fishman to the estate of Amy Michelle Fishman, a minor;

It is therefore ORDERED that Rita I. Fishman reimburse the amount of 39,154.76



dollars to the estate of Amy Michelle Fishman, a minor.

It is further ORDERED that Carlos F. Vela shall continue as Temporary Guardian of the estate of Amy Michelle Fishman, a minor, until a Permanent Guardian is appointed by this court. Said Temporary Guardian shall continue to serve without bond.

It is further the ORDER of this Court that the Temporary Guardian shall file an Amended report in this case with regard to the inventory and appraisal of the Estate of said minor by no later than August 12, 1988.

SIGNED FOR ENTRY THIS 26th day of July, 1988.

Noe Robles
JUDGE PRESIDING

DE#1 was identified at the indigence hearing (R. II-6) and discussed (R. II-9, 10, 15-17, 19-20). In preparation for that July 21, 1988 hearing and in substance during that hearing, attorney Vela became familiar with the estate of the minor child Amy Fishman (R. II-6, 7, 11-12).

In that probate case, Mr. Vela propounded Interrogatories to appellant Rita Fishman addressing the extent of the estates

of Rita Fishman and her daughter, Amy, including their respective assets and liabilities (R. II-6, 7 & 11). Mr. Vela testified that he understood Amy and her mother, appellant, are living at the home Vela referred to as "the homestead". Vela knew the extent of Amy and Rita Fishman's assets. Appellant's major asset is her undivided one half community interest in the family residence and its adjacent real property. Vela placed the total value on her share of both properties at about \$42,000.00. \$13,000.00 is her one-half share of the total homestead's mortgage liability of \$25,000.00 (R. II-8, 9, 12). Mr. Vela further testified that there were two outstanding money judgments against Rita Fishman. He stated the first arose out of a wrongful death claim filed by Mr. and Mrs. Nate Fishman (parents of deceased Samuel Fishman) in the United States District Court. He stated he was unsure of the

amount of the judgment, but believed it exceeded \$100,000.00. The second judgment was an order by the Probate Court, Judge Noe Robles presiding, ordering Rita Fishman to re-imburse \$39,154.76 to the guardian of her daughter's estate for the 1983-1986 expenses appellant had previously made on behalf of her child Amy. (R. II-9, 10, 15, 16; SSI 2-3).

According to Mr. Vela's calculation, Rita Fishman has a negative net worth, certainly in the negative amount of \$16,000.00 if one considers only her homestead's mortgage and Judge Robles order to reimburse, but perhaps as much as \$116,000.00 if one also takes into consideration the federal court judgment in favor of appellant's in-laws (R. II-9, 10).

Mr. Vela also testified his investigation showed that the defendant was not employed outside the home during the course of her marriage and had not held a wage-



earner's position for ten to thirteen years. He did state, however that appellant had been a bookkeeper in the past and had very recently applied for a position through the Texas Employment Commission (R. II-7).

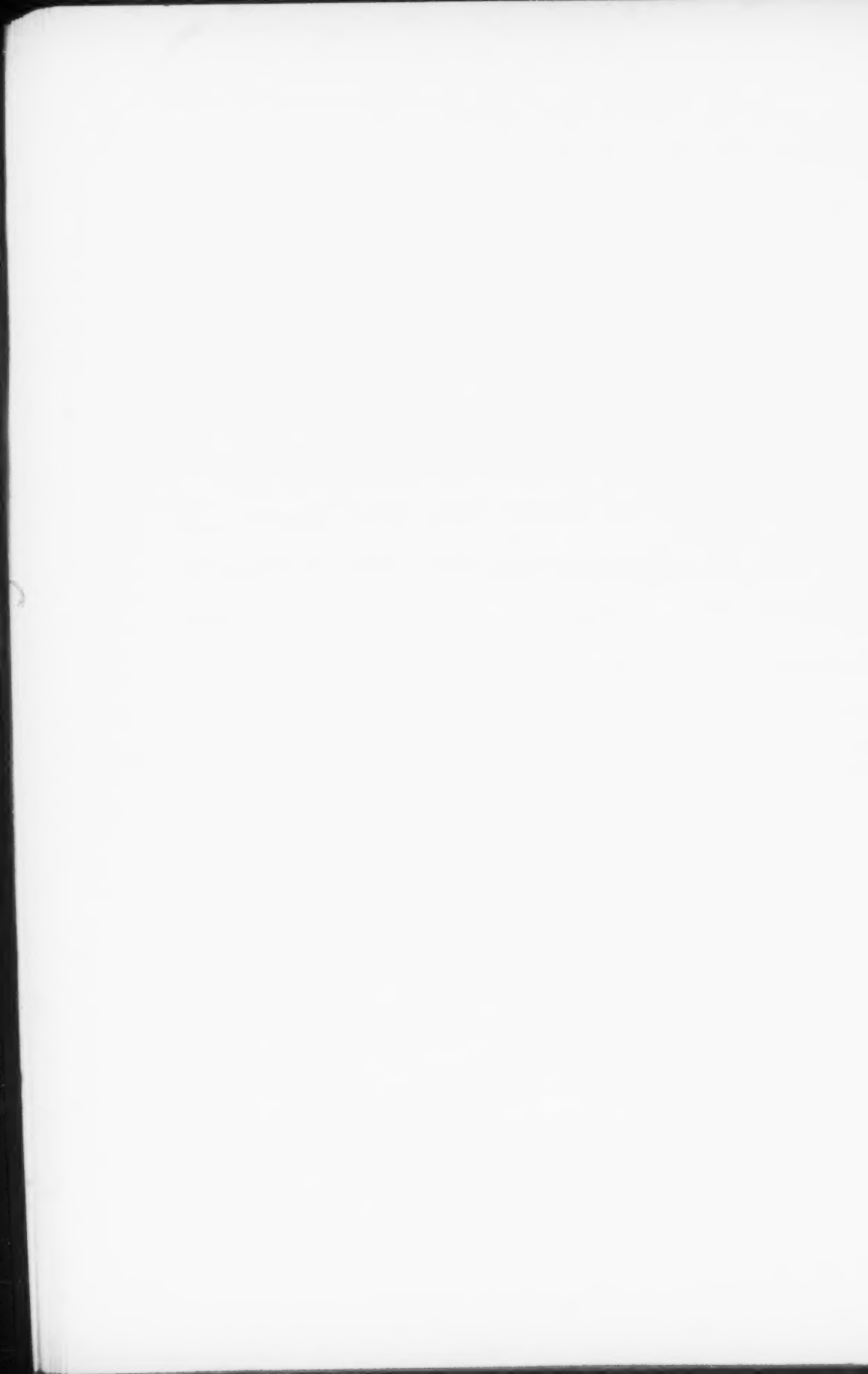
Mr. Vela further testified (R. II-18, 19) that he had in his possession copies of Ms. Fishman's tax return for tax year 1987 (R. SI-40-48). That 1040 IRS return not only indicates appellant Fishman received an annuity of \$5,772.00 from the Federal Civil Service Survivor (R. SI-40, 44), but also indicated appellant paid the 1987 taxes on the \$7,403.17 that appellant's daughter Amy Fishman had received as interest earned from the accounts held for Amy's benefit in a Houston bank by the U.S. District Clerk for the Southern District of Texas. By recent order of the United States District Court for the Southern District of Texas, that annual interest of approximately \$7,400.00 on Amy Fishman's estate previously paid to



appellant Rita Fishman is now being paid to Mr. Vela as guardian of the child's estate.

The district court also took judicial notice of the 29 pages of records, 1987 income tax returns, financial reports, and order which appellant introduced into evidence (R. II-3, 4; SI-20-49; SSI-2,4). Among those 29 pages are the Report of Inventory, Appraisement and List of Claims (hereinafter referred to as the Report) submitted under oath by Mr. Vela (R. I-22-32). That Report also includes appellant Fishman's sworn response to interrogatories propounded to her by Mr. Vela pursuant to Rule 168, T.R.Civ.P. (R. SI-33-37) and her verified response to Mr. Vela's Request for Production of documents (R. SI-38-48). That Report and its exhibits may be summarized as follows:

- 1) Ms. Rita Fishman earns approximately \$5,772.00 per year in Federal Civil Service Survivors' Annuity (R. SI-44 & 40; II-18).



- 2) Ms. Rita Fishman and her daughter are tenants in common in the family homestead (R. SI-37).
- 3) The child, Amy Fishman, earns \$2,880.00 per year in Civil Service Annuity and \$7,400.00 per year in interest (R. SI-45-48 & 42) (Sums are now paid to Hon. Carlos Vela as guardian in her estate).
- 4) Ms. Rita Fishman's one-half undivided interest in the family homestead is approximately \$42,000.00 (R. SI-23 & 37).
- 5) Ms. Rita Fishman's liability to Southmost Savings and Loan, lienholder on the homestead mortgage is \$12,888.36 (R. SI-24 & 36).
- 6) Amy Fishman inherited 2/3 of Sam Fishman's one-half share of the personal property in the community estate (R. SI-37).

Additionally, the 1987 U.S. Internal Revenue Service's Individual Tax Return Forms 1040 for appellant Rita I. Fishman and Amy Fishman show:



I.

RITA'S ANNUAL INCOME IN 1987:

- | | | | |
|-----|--------------------------|------------|---|
| (a) | (R. SI-42,
40; II-18) | \$ 34.54 | Interest from
Valley Federal
Credit Union |
| (b) | (R. SI-40,
44) | \$5,772.00 | Annuity from
Federal Credit
Service
Survivor |
| (c) | TOTAL | \$5,806.54 | |

II.

AMY'S ANNUAL INCOME IN 1987:

- | | | | |
|-----|----------------------|-------------|--|
| (a) | (R. SI-47) | \$2,086.39 | Interest on
Valley Federal
Savings Credit
Union |
| (b) | (R. SI-45,
48) | \$2,820.00 | Annuity from
Federal Civil
Service
Survivors |
| (c) | (R. SI-40;
II-18) | \$7,368.63 | Interest on
U.S. District
Court Savings
Account |
| (d) | TOTAL | \$12,275.02 | |

Therefore, the following logical inferences and conclusions can be made

concerning appellant's estate as of August 4, 1988:

(1) Ms. Fishman's yearly income is approximately \$5,772.00 (R. II-18-19).

(2) Less than \$43,200.00 in property is the value of Ms. Fishman's sole assets, which consist of her 1/2 undivided interest in the homestead, and of her 2/3 interest in the personal property of the original community estate of herself and her deceased husband Samuel Fishman.

(3) Ms. Fishman's liabilities total:

- a) \$ 12,888.36 (Home Mortgage)
- b) 39,154.76 (owned to child's estate;
(Pet. App. 32; R. SSI-2-3)
- c) 100,000.00+ (owed to Ms. Fishman's
in-laws)

\$152,043.12 Total liabilities.



Accordingly, Ms. Fishman's liabilities exceed her assets by not less than \$108,843.12.

Of course, that Report and its exhibits also lists the assets for minor Amy Fishman. Concerning Amy's "cash on hand" and real estate, that Report's subparagraphs II, III and VI read (R. SI-22, 23):

II. Attached as Exhibit B is a Final Judgment issued by the U.S. District Court for the Southern District of Texas, Brownsville Division in Cause No. B-82-360 styled Metropolitan Life Insurance Company vs. Rita Iris Fishman and Amy M. Fishman awarding Amy Fishman \$147,518.44 and placed in trust with the U.S. District Clerk for said Court for the benefit and use of such Minor. From this amount, the amount of \$18,565.56 was deducted to pay the Attorney Ad Litem, appointed by the Court.

These funds are deposited in the First City National Bank in Houston, Texas.

III. In February of 1987, the amount of \$40,000.00 was paid to Rita Fishman as Guardian of the Estate of Amy M. Fishman by the Connecticut General Life Insurance Company under Policy No. 033-4255



which apparently was a Life policy on the life of Samuel Fishman.

VI. INVENTORY APPRAISEMENT AND LIST OF
CLAIMS AS OF JUNE 15, 1988

A. Real Property

1. One-Half undivided interest into Tract I, 1.43 acres, more or less, Lot 17, Betty Acres Subdivision, Blocks 207, 208, 307, and 308, El Jardin Re-subdivision, Cameron County, Texas.
2. One-Half undivided interest into Tract II, 1.38 acres, more or less, Lot 18, Betty Acres Subdivision, Cameron County, Texas.
3. Approximate Value of the One-Half interest of Amy M. Fishman into above realty is \$42,000.00.

B. Personal Property

1. Savings Accounts, Annuities and Cash
 - a. Savings Acct. #3362-2 at Valley Federal Savings Credit Union in Brownsville, Texas under the name of Rita Fishman in Guardianship of Amy Michelle Fishman (as



of 6-15-88)
35,049.29

b. Savings or other type
of account at the
First City National
Bank in Houston,
Texas under the
control of the Clerk
of the U.S. District
Court for the South-
ern District of Texas
in compliance with
Cause #B-82-360
styled Metropolitan
Life Insurance
Company vs. Rita I.
Fishman and Amy M.
Fishman, et al
..... 130,028.16

c. Federal Civil Service
Survivor Annuity
... 2,800.00 annually

C. Other Miscellaneous
Property

1. 1978 Peuquat Automo-
bile .. Value Unknown
2. Household furniture,
appliance etc., (1/2
interest)
..... 1,000.00

(This Inventory for the most
part is based upon the Answers
of Rita I. Fishman to
Interrogatories attached hereto
as Exhibit C.)



The State did not controvert any of that defensive testimony and evidence on indigence.

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial discretion and allow the writ in this case because:

(a) as to the third, fourth and fifth questions presented here, the Texas Court of Appeals and the Texas Court of Criminal Appeals have decided an important question of federal law which has not been, but should be, settled by this Court, namely whether or not Griffin v. Illinois, 351 U.S. 12 (1956) and its progeny require the state to provide a process by which a convicted accused may have the appellate court abate the merits appeal process so that the convict may litigate her right to have the state provide at no cost to the convict a



record of the jury trial so that her first direct appeal, which is provided to all people in that state, may be effective; however if the appellate courts properly refuse to order the state to provide that convict with a free record for purposes of an appeal, then should that convict be provided a reasonable amount of time within which to personally purchase that appellate record with funds provided by her relatives and friends as petitioner's undersigned attorney and New York uncle have belatedly agreed to do in this case (Pet. App. 55-58), especially where there is a change of the convict's financial condition during the process of the indigence appeal as in this cause where prior to her January 1990 incarceration in the penitentiary in this case, petitioner's monthly expenses far exceed her monthly government widow's benefits, which were recently terminated by the government (Pet.App. 64-67).



(b) as to the first and second questions presented here, the Texas Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, namely whether or not Griffin v. Illinois, 351 U.S. 12 (1956) and its progeny require a widow to be declared indigent for appeal record purposes if she has been sentenced in 1988 to ten years incarceration and her IRS deductible home mortgage interest was \$2,448.32 in 1987 but her total annual income consists of less than \$6,000 to support herself and her child, since Petitioner was unable to immediately buy a \$9,000 appeal record without being forced to sell her undivided one half interest in her and her child's residence and its accompanying two lots, all of which by Texas law is considered the homestead of Petitioner and her child. That question could be rephrased as a determination on whether or not Petitioner

and her minor child's individual ownership by each of an undivided one-half interest in the real property adjacent to the family residence and its real property, can be considered not only as a determinative factor of non-indigence but also as a subject for forced sale or forced encumbrance to secure funds to pay for the reporter's statement of facts and transcript so that the petitioner must lose the indigence hearing upon failure to introduce evidence why petitioner's one-half undivided interest with a minor child in that 1.38 acre adjacent lot could not legally be immediately encumbered or sold in order to provide security or payment for the merits appellate record.

(c) as to the first and second questions presented here, exercise of this Court's power of supervision is called for since the court of appeals has so far departed from the accepted and usual course



of judicial proceedings. The 13th Court of Appeals held petitioner to have fatally failed to introduce evidence why the 1.38 acre lot could not legally be encumbered or sold. However, that 13th Court knew:

- (1) Petitioner had no obligation to introduce evidence of the below law, for it is known to the courts of Texas and need not be introduced as evidence to be before the trial or appellate judiciary in its decisional role in petitioner's case.
- (2) Petitioner owned only a one-half interest in that property;
- (3) That property was adjacent to homestead and therefore itself homestead;
- (4) Article 16, Section 50 of the Texas Constitution provides:

The homestead of a family,
or of a single adult person,
shall be and is hereby

protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law.

No mortgages, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefore, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving and condition of defeasance shall be void. This amendment shall become effective upon its adoption, Tex.Const.Art. 16, Sec.50, (Vernon's Supp. 1989).



ARGUMENT ON FIRST AND SECOND QUESTIONS

The only issue presented is the question of whether or not the petitioner is indigent or quasi-indigent for purposes of the direct appeal below and is entitled to a court-ordered free appellate record. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

Offered into evidence and judicially noticed (received in evidence) at petitioner's request (R. II-2-4) was her affidavit of indigency and her request therein for a free record on appeal. With that affidavit in evidence, petitioner believes she proved her financial status for purposes of obtaining a free record under applicable federal and state law. See Tex.R.App. 53(j)(2). That affidavit read (Pet. App. 25-26; R. SI-10):



BEFORE ME, the undersigned authority, personally appeared the above Defendant, who being by me duly sworn on oath said:

"My name is RITA IRIS FISHMAN and I am the Defendant in the above styled and numbered cause. On April 21, 1988, the judgment and imposition of sentence was entered against me in this cause. I have given Notice of Appeal to the Court of Appeals for the Thirteenth Supreme Judicial District of Texas, sitting in Corpus Christi, Texas. Other than my personal possessions and several other assets, having a total value of much less than \$9,000, and my undivided interest in one-half of our residence. I am indigent and live on a very limited income. After normal living expenses are provided for, I have insufficient money, property or assets of any kind available to pay for or give security in order to pay for the Statement of Facts or Transcript in this cause. I have been informed that the trial court reporter estimates that she will need \$9,000 to pay the expense of preparing the statement of facts in the above case. I am unable to pay the reporter that \$9,000. I hereby request that the Court order the court reporter to furnish a Statement of Facts of the entire trial proceedings at no expense to me and to further order the Clerk to furnish the Transcript in this cause at no expense to me."



/s/ Rita Iris Fishman
AFFIANT

SWORN TO AND SUBSCRIBED before
me, this the 23rd day of June, 1988.

/s/ Emma Garcia
Notary Public In and For
The State of Texas

Based on that affidavit, petitioner unequivocally proved in the district court that petitioner lives on such a very limited income and is indigent other than her personal possessions and several other assets, having a total value of much less than \$9,000.00, and her undivided interest in one-half of her residence, and after normal living expenses are provided for, she has insufficient money, property or assets of any kind available to pay for or give security in order to pay for the Statement of Facts and Transcript in this cause. There was no evidence before the district court to discredit any of those affidavit

facts. If, as and when the State discovers any false representations in petitioner's affidavit, the State's remedy is not a finding of non-indigency but a perjury indictment. Of course a residence sets on land, whether the land be composed of one or more urban lots. Such lots can still be, and are herein, homestead.

No where in the record is there evidence that petitioner personally paid the cost of her pre-trial or appeal bail bonds or the cost of attorneys' fees for trial or appellate work. In fact petitioner personally received financial gifts and loans from family and relatives to be able to afford and to pay all those bail and attorneys' expenses.

Nevertheless, the 13th court of appeals said (Slip Opinion at 6):

In the case now before us, we cannot find that the trial court abused its discretion in failing to find that appellant could not pay for or give security for a \$9,000



statement of facts. Appellant did not introduce any evidence concerning her living expenses. Although there was evidence that appellant had been unemployed, the record reflects that appellant was able to secure bond and retain counsel.

Petitioner, represented by retained counsel at the original trial, was sentenced on April 6, 1988. Notice of appeal was first given on April 8, 1988. Petitioner's motion for new trial was timely filed and later denied on May 20, 1988. On June 23, 1988, petitioner's affidavit of indigency was timely filed. On August 4, 1988, the district court conducted a hearing to determine petitioner's indigence for the purposes of appeal. After considering the evidence, the district court denied this original request for a free record while proceeding in forma pauperis. No other hearing on this issue has yet been held. This Court must now determine from the record if the district court's ruling



constitutes an abuse of discretion on the question of petitioner's indigency.

In Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971), the Court vacated the Illinois Supreme Court's order denying Mayer's motion for an order that he be furnished a transcript of proceedings without cost. The Court said, Id. 404 U.S. at 194-196, 199-200, 92 S.Ct. at 414-417 (footnotes omitted):

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), is the watershed of our transcript decisions. We held there that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Id., at 19, 76 S.Ct., at 591. This holding rested on the "constitutional guaranties of due process and equal protection both [of which] call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." Id., at 17, 76 S.Ct., at 589. We said that "[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence * * *," id., at 17-18, 76 S.Ct., at 590, and concluded that "[t]here



can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, at 19, 76 S.Ct., at 591. Appellee city of Chicago urges that we re-examine Griffin. We decline to do so. For "it is now fundamental that, once established * * * avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966). Therefore, "[i]n all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. * * *" *Draper v. Washington*, 372 U.S. 487, 496, 83 S.Ct. 774, 779, 9 L.Ed.2d 899 (1963). In terms of a trial record, this means that the State must afford the indigent a "'record of sufficient completeness' to permit proper consideration of [his] claims." *Id.* at 499, 83 S.Ct., at 781 (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S.Ct. 917, 921, 8 L.Ed.2d 21 (1962)).

* * * * *

We emphasize, however, that the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way. Moreover, where the grounds of



appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an "alternative" will suffice for an effective appeal on those grounds. This rationale underlies our statement in Draper, supra, at 498, 83 S.Ct., at 780 that:

"[T]he State could have endeavored to show that a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration of petitioners' contentions. The trial judge would have complied with * * * the constitutional mandate * * * in limiting the grant accordingly on the basis of such a showing by the State."

* * * * *

IV

We conclude that appellant cannot be denied a "record of sufficient completeness" to permit proper consideration of his claims. We repeat that this does not mean that he is automatically entitled to a full verbatim transcript. He urges that his claims of insufficiency of the evidence and prejudicial prosecutorial misconduct cannot be fairly judged without recourse to the trial record. Draper suggests that these are indeed the kinds of claims that



require provision of a verbatim transcript. See also *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). In *Draper*, however, the State of Washington did not undertake to carry its burden of showing that something less than a complete transcript would suffice. Here the City of Chicago urges that the Illinois procedures for a "Settled" or "Agreed" statement may provide adequate alternatives. The city also argues that even if a verbatim record is required, less than a complete transcript may assure fair appellate review. We cannot address these questions, since the record before us contains only the parties' conflicting assertions; so far as appears neither of the Illinois courts below regarded resolution of the dispute to be relevant in light of Rule 607(b). That this was the view of the Circuit Court is clear. The order of the Supreme Court, however, may not have been based on the rule, but on the ground that appellant had the burden of showing that the alternatives of a "Settled" or "Agreed" statement were inadequate. We hold today that a denial of appellant's motion, either on the basis of the rule, or, in the context of his grounds of appeal, on the basis that he did not meet the burden of showing the inadequacy of the alternatives, would constitute constitutional error.



We are informed that appellate's appeal from his conviction has been docketed in the Illinois Supreme Court and that its disposition has been deferred pending our decision of this case. We therefore vacate the order of the Illinois Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion.

In Williams v. Oklahoma City, 395 U.S. 458, 89 S.Ct. 1818, 21 L.Ed.2d 440, (1969), the Court reversed the judgment of the Oklahoma Court of Criminal Appeals, saying (footnote omitted):

Petitioner, an indigent, had no funds to pay for a transcript of the trial proceedings in the Municipal Criminal Court of Oklahoma City required to prepare the "case-made" needed to perfect his appeal to the Oklahoma Court of Criminal Appeals from his conviction for drunken driving and the imposition of a 90-day jail sentence and a \$50 fine. The trial proceedings had been stenographically transcribed pursuant to Oklahoma law, Okla.Stat.Ann., Tit. 11, § 798 (1959), Okla.Stat.Ann., Tit. 20, §§ 110-111 (1962), but the trial court had refused in the absence of statutory authority to order that a copy be provided petitioner at public expense, although finding that petitioner was an indigent



whose grounds of appeal were not without merit, and that neither petitioner nor his appointed counsel could make up a transcript of the trial proceedings from memory. The Court of Criminal Appeals, in an original proceeding brought by petitioner, also refused to order that petitioner be provided a copy at public expense. The court agreed with the trial court that no Oklahoma statute or Oklahoma City ordinance authorized such an order, and held further that the Fourteenth Amendment did not mandate "that an indigent person, convicted for a violation of a city ordinance, quasi criminal in nature and often referred to as a pretty offense, is entitled to a case-made or transcript at city expense in order to perfect an appeal from said conviction." 439 P.2d 965 (1968). We granted certiorari. 393 U.S. 998, 89 S.Ct. 490, 21 L.Ed.2d 463 (1968). We reverse.

"This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811; Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892; Draper v. State of Washington, 372 U.S. 487, 83 S.Ct.



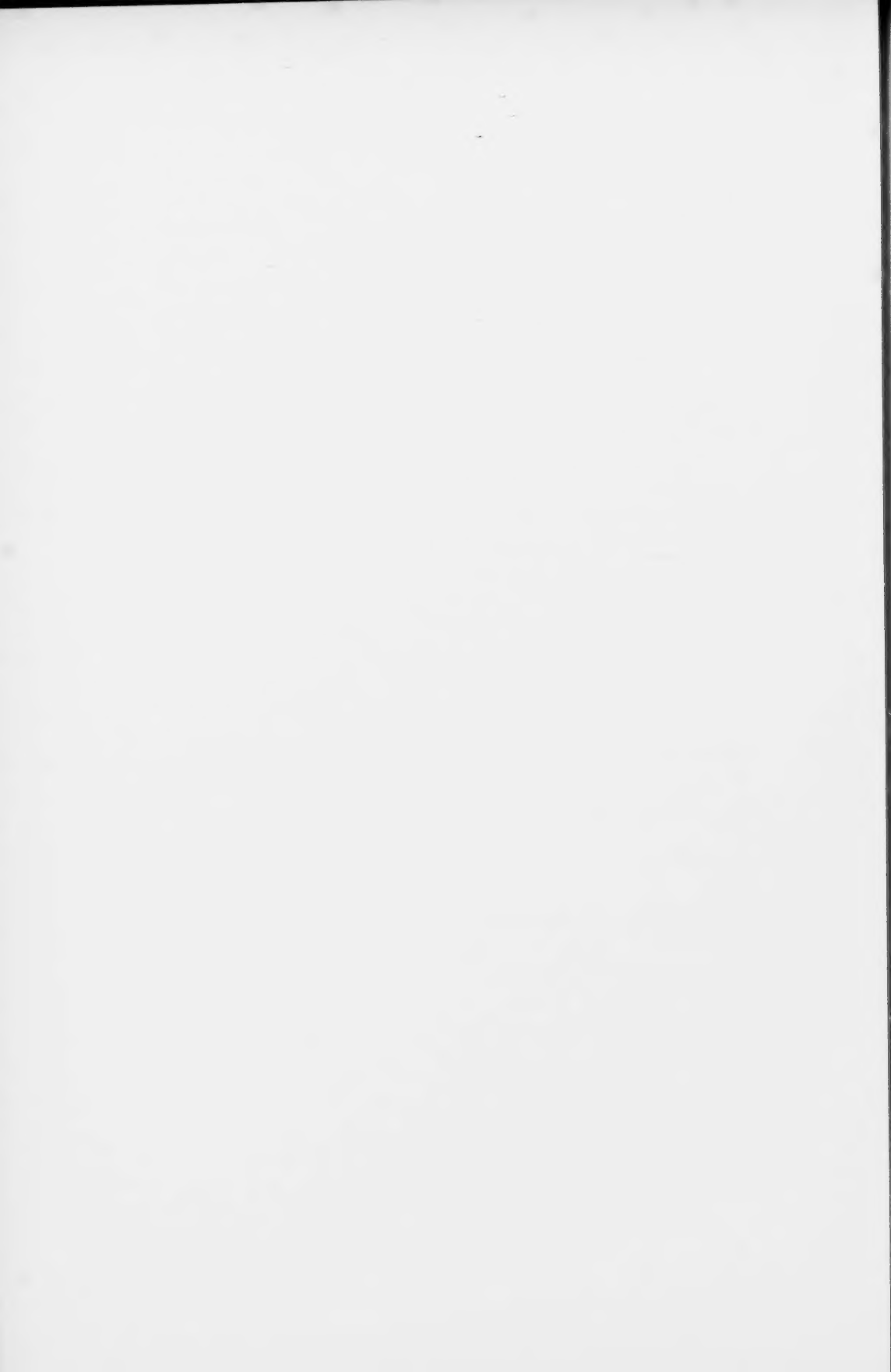
774, 9 L.Ed.2d 899." Rinaldi v. Yeager, 384 U.S. 305, 310-311, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966). Although the Oklahoma statutes expressly provide that "[a]n appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against him * * *" Okla.Stat. Ann., Tit. 22, § 1051 (Supp. 1968) (emphasis added), the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner, but grants the right only to appellants from like convictions able to pay for the preparation of a "case-made." This is an "unreasoned distinction" which the Fourteenth Amendment forbids the State to make. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956); Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963); Eskridge v. Washington State Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958).

The judgment of the Court of Criminal Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice BLACK concurs in the result.



The status of "indigency" is to be made upon a case-by-case analysis of each situation. There are no rigid standards for determining indigency on appeal. Abdnor v. Ovard, 653 S.W.2d 793 (Tex.Cr.App. 1983). The question of indigency for appeal purposes is to be determined at the time of the appeal, not at the time of the trial. "[W]e have clearly stated that the issue of indigency 'implicates the personal financial condition of an appellant, not that of his parents or other relatives.'" Abdnor v. Ovard, 653 S.W.2d 793, 794 (Tex.Cr.App. 1983). A determination of indigency for the purpose of appeal is complicated by the fact that the appellate process often lasts for many months, or even years, before the final disposition of the case.

In the past, the appellate courts have had to deal with very complex factual issues for determining the question of indigency, based upon extremely meager records, with



conflicting and often confusing testimony being given therein. In some cases, the question of non-indigency is clear and can be readily decided.

ARGUMENT: APPLICATION OF LAW TO THE FACTS

With this background, this Court can turn to the case before it. Petitioner exercised due diligence in attempting to secure the statement of facts and transcript by timely filing her affidavit of indigency embodying her request. In response to the affidavit, an indigency hearing was held. Petitioner was present and offered documentary and third-party testimonial evidence. Like in Abdnor v. State, 712 S.W.2d 136, 142 (Tex.Cr.App. 1986), petitioner cannot be faulted for failing to exercise due diligence. The remaining issue is "Did she then satisfy the burden of sustaining the allegations of the affidavit at the hearing?"



There is no testimony in this record as to what petitioner's legal expenses were to retain counsel for the purposes of trial or appeal. As to any outstanding balances still owed to said attorneys as of August 4, 1988, there is no testimony in this record. While there was no live testimony about the availability of a plan to provide for the payment of those record costs in installments, petitioner's evidentiary affidavit (R. SI-10) clearly demonstrates "the money just ain't there."

This "interim" record reflects that while her 13 year old child was being raised, petitioner has not been employed outside the home for 10 to 13 years. Petitioner's personal net income for 1987, totalled \$5,806.00 = \$5,772.00 plus \$34.54 (R. SI-40, 42). From these sums, substantial amounts were required to be paid for the mortgage and current necessary living expenses to support petitioner and



her minor child Amy who lives with petitioner. \$2,448.32 is the deductible home mortgage interest petitioner paid in 1987 (R. SI-43).

This "interim" record reflects that in 1987 the personal net income of petitioner's child Amy totalled \$12,274.02 = \$7,368.63 plus \$2,086.39 plus \$2,820.00 (R. SI-42, 45, 48). Presently in 1988, Amy's money is going to guardian Vela. (R. SSI-2-3; II-18-19).

Guardian Vela is a trustee and can not be expected to use Amy's money to pay these appellate record expenses for Amy's mother, petitioner. When Amy's property and money are disregarded petitioner is caught in a "Catch-22". Probate Court Judge Robles has effectively prohibited petitioner from utilizing any of Amy's annual income to feed, cloth or house Amy. (R. SSI-2,3; II-15, 16). If the non-indigent finding were affirmed on appeal, District Court



Judge Valdez has effectively prohibited petitioner either from appealing the merits of the jury trial conviction or from not only paying the homestead mortgage but also from purchasing any clothes or food.

The reviewer must recall that District Judge Valdez expressly said on August 4, 1988 (R. II-28, lines 16-21):

Let the record show that based on the evidence that I have heard, the Court finds that Ms. Fishman is not indigent at this time, that she can, has the disposal of sufficient sums of money to obtain her own transcript. those are the findings of this Court.

From where those sufficient disposal funds will come, Judge Valdez did not articulate. Other than her former annual annuity of \$5,772.00, the homestead is the one exception to that economic fact. The record is clear that petitioner had access to no money for that appellate record on August 4, 1988. The district court did not find that petitioner had to sell or re-mortgage the



homestead to pay for the appellate record herein. Of course, the Texas Constitution prohibits such forced sale of a homestead to pay a debt. The Texas Constitution also voids second mortgages on homesteads since they are not for purchase money. Likewise, the homestead is only half owned by petitioner. The other half is owned by a minor who is unable to consent to the forced sale not only of the roof over her own bed but also the land on which her bathroom and bedroom are built.

Petitioner submits that federal constitutional law surely prohibit a low income person such as petitioner either from having to buy her own appellate record and not eat and lose the house or from having to sell or unconstitutionally re-mortgage her 1/2 interest in the homestead or from having to starve herself and criminally starve her daughter for nearly two years. Under these facts, the federal constitution requires



Cameron County to pay for the record on appeal in this case.

ARGUMENT: CONCLUSION

This Court should conclude that petitioner at the time of the indigence hearing on August 4, 1988, petitioner was at least a quasi-indigent. Even though this Court holds that from this record the trial court erred in declaring petitioner not to be an indigent, there is no more evidence on the issue of indigence than that previously presented. The State is not entitled to "Two bites at the apple". Petitioner is entitled as an indigent by federal constitutional law to both a clerk's free transcript and the reporter's free statement of facts. The cost must be borne by the State's convicting authority, Cameron County, Texas.

ARGUMENT ON THIRD THROUGH FIFTH QUESTIONS

The Texas Court of Appeals affirmed the district court's judgment of conviction and



incarceration sentence against Petitioner without seeing that Petitioner was furnished the court reporters' statement of facts so petitioner could on appeal show that her claimed "merits errors" were not frivolous.

The Fourteenth Amendment was violated by the State of Texas' failure to pay for the trial court reporter's statement of facts for Petitioner, who as required by Texas Rule Appellate Procedure 53(j)(2), had proved that petitioner was unable to personally pay for or give security to the court reporter's statement of facts.

In violation of Petitioner's equal protection and due process rights, Petitioner has been denied her first direct "merits appeal" provided to all persons in Texas, since the Texas courts refused her the right to proceed in forma pauperis in order to afford petitioner effective review of errors that occurred during her trial and sentencing by jury.



Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 58, 100 L.Ed. 891 (1956) requires the promulgation of procedure and appellate practice so an indigent defendant is not denied equal protection by a state's failure to provide a stenographic transcript or an effective alternative in order to afford the indigent petitioner an effective appeal.

By promulgating Texas Rule Appellate Procedure 53(j)(2), the Texas Court of Criminal Appeals has taken the first step in assuring indigents their Griffin rights. However, the Texas criminal justice system makes no provision to assure to this Petitioner the right to direct appeal on the merits of the jury trial, since Petitioner timely but unsuccessfully asserted her inability to pay for an appeal record since a Texas appellate court later found Petitioner to be able to pay for a part or all or give security for a part or all of the record on appeal.



Petitioner's 1988 motion to abate

appeal read (Pet. App. 41-43):

Pursuant to Hicks v. State, 544 S.W.2d 424, 426 (Tex.Cr.App. 1976) and Abnor v. State, 712 S.W.2d 136, 144 (Tex.Cr.App. 1986), appellant moves the Court to abate this appeal and to remand the cause to the trial court for action consistent with this Court's opinion. As grounds, appellant points out:

- (1) On August 4, 1988, the district court in effect orally concluded appellant was not indigent after hearing evidence on appellant's affidavit of indigency for purposes of obtaining an appellate transcript and statement of facts in the above case.
- (2) On August 12, 1988, appellant timely filed notice of appeal from that "non-indigency hearing". Attached is a true copy of that notice of appeal, etc.
- (3) Few further appellate steps can be performed by appellant until the record from the "non-indigency" hearing are filed in this Court of Appeals.

Petitioner's 1989 motion to abate and

its verified acknowledgment by attorney

Connors read (Pet. App. 54-57):



Rita Iris Fishman, appellant moves the appellate court to abate this appeal and to order the district court to hold a hearing pursuant to Texas R.App.P. 53(m) and (j) to determine at the present time (nearly a year since the August 4, 1988),

- A. whether this appellant has now been deprived of a statement of facts because of ineffective counsel or for any other reason; and/or
- B. whether this appellant is now unable to pay for or give security for all or part of the court reporter's statement of facts and the district clerk's transcript.

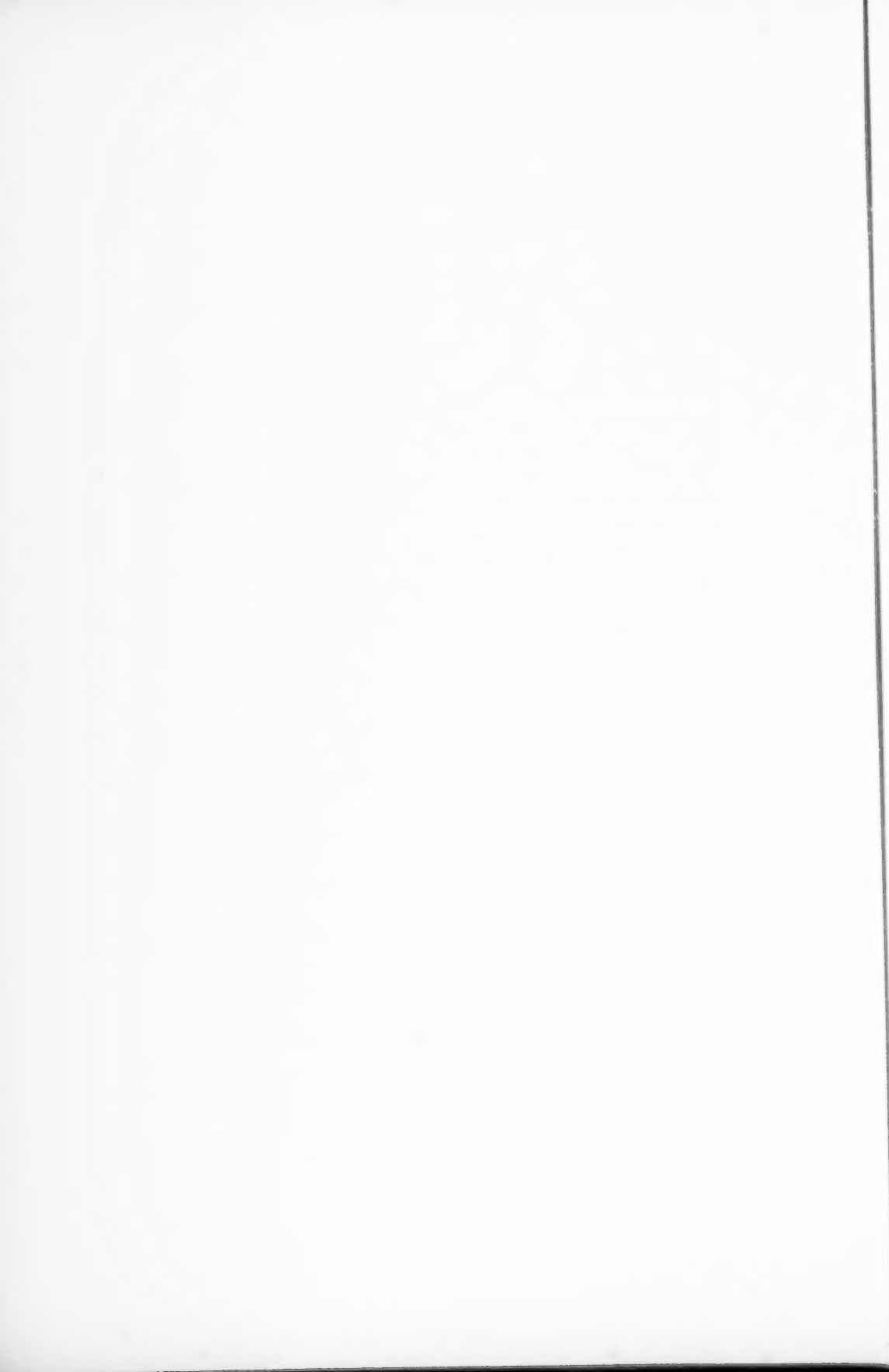
ACKNOWLEDGEMENT BY ATTORNEY CONNORS

Attorney Joseph A. Connors III is having ethical pangs of conscience. Connors has been paid to prepare a merits appellate brief but has not been provided a record with which to prepare appellant's merits appeal. During oral argument in this case, presiding judge Utter inquired in effect if attorney Connors were willing to buy the appellate record. Now after receiving the 13th Court's opinion dated April 20, 1989, attorney Connors has determined that if the district court legally denied such merits record to appellant, then appellant must have one even if it means attorney Connors will have to sacrifice part of his appellate attorney's fees. On May 17, 1989 about 5:30 p.m. CST, attorney



Connors spoke by phone to appellant's uncle in New York. That uncle said he will obtain the money to now buy the appellate record if the appellate court's opinion remains unchanged. Thus attorney Connors requests the 13th Court to consider the foregoing first amended or second motion for rehearing. If the district court's judgment is still to be affirmed, attorney Connors on behalf of appellant requests time from the 13th Court so the court reporter can be paid the \$9,000.00 by attorney Connors and appellant's New York uncle (two persons not legally obligated to so act) so that now at this late date, appellant can properly and fully exercise her statutory right to appellate review of the merits of her jury trial.

Petitioner concludes that Texas courts need to adopt a procedure, if none presently exists, to give an alternative to preserve the petitioner's right to direct appeal on the merits of the contested trial to that petitioner, who was initially legally mistaken as to his or her inability to pay status under T.R.A.P. 53(j)(2), but who should not subsequently be deprived



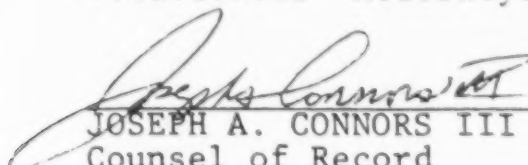
judicially of the statutory right to appeal
created by Article 44.02, V.A.C.C.P.

CONCLUSION

For all the foregoing reasons,
petitioner respectfully urges that this
Court grant this petition, reverse the
judgments below and remand this case to one
of the courts below for action not
inconsistent with this Court's opinion.

DATE: February 27, 1990.

Respectfully submitted by
Petitioners' Attorneys,

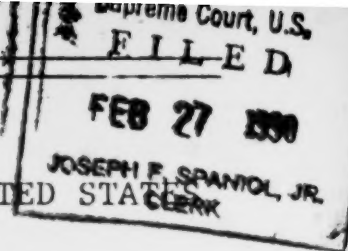

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WILLIAM OWEN
2727 Morgan Avenue
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Corpus Christi, TX 78405

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989



RITA IRIS FISHMAN, PETITIONER

- VS. -

THE STATE OF TEXAS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE THIRTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS AND TO THE
TEXAS COURT OF CRIMINAL APPEALS

APPENDIX TO PETITION

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ATTORNEYS FOR PETITIONER

February 27, 1990

89 pp



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TO PETITION FOR WRIT OF CERTIORARI

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CAUSE NO. 13-88-181-CR

(Tr. Ct. No.
88-CR-87-E)

RITA IRIS FISHMAN,

Appellant,

V.

THE STATE OF TEXAS,

Appellee,

on appeal to this Court from Cameron County,
Texas.

* * * * *

JUDGMENT

On appeal from the 357th District Court of Cameron County, Texas, from a judgment signed April 21, 1988. Opinion by Justice Fortunato P. Benavides. Opinion ordered published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on January 5, 1989, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below, and said judgment is hereby AFFIRMED against appellant, RITA IRIS FISHMAN.

Costs of the appeal are adjudged against appellant, RITA IRIS FISHMAN. It is further ordered that this decision be certified below for observance.

* * * * *

BETH A. GRAY, CLERK



NUMBER 13-88-181-CR

COURT OF APPEALS

THIRTEENTH JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI

* * * * *

RITA IRIS FISHMAN, Appellant,

v.

THE STATE OF TEXAS, Appellee.

* * * * *

On appeal from the 357th District Court of
Cameron County, Texas.

* * * * *

Before Fortunato P. Benavides; Norman L.
Utter; and J. Bonner Dorsey; J.J.

* * * * *

O P I N I O N

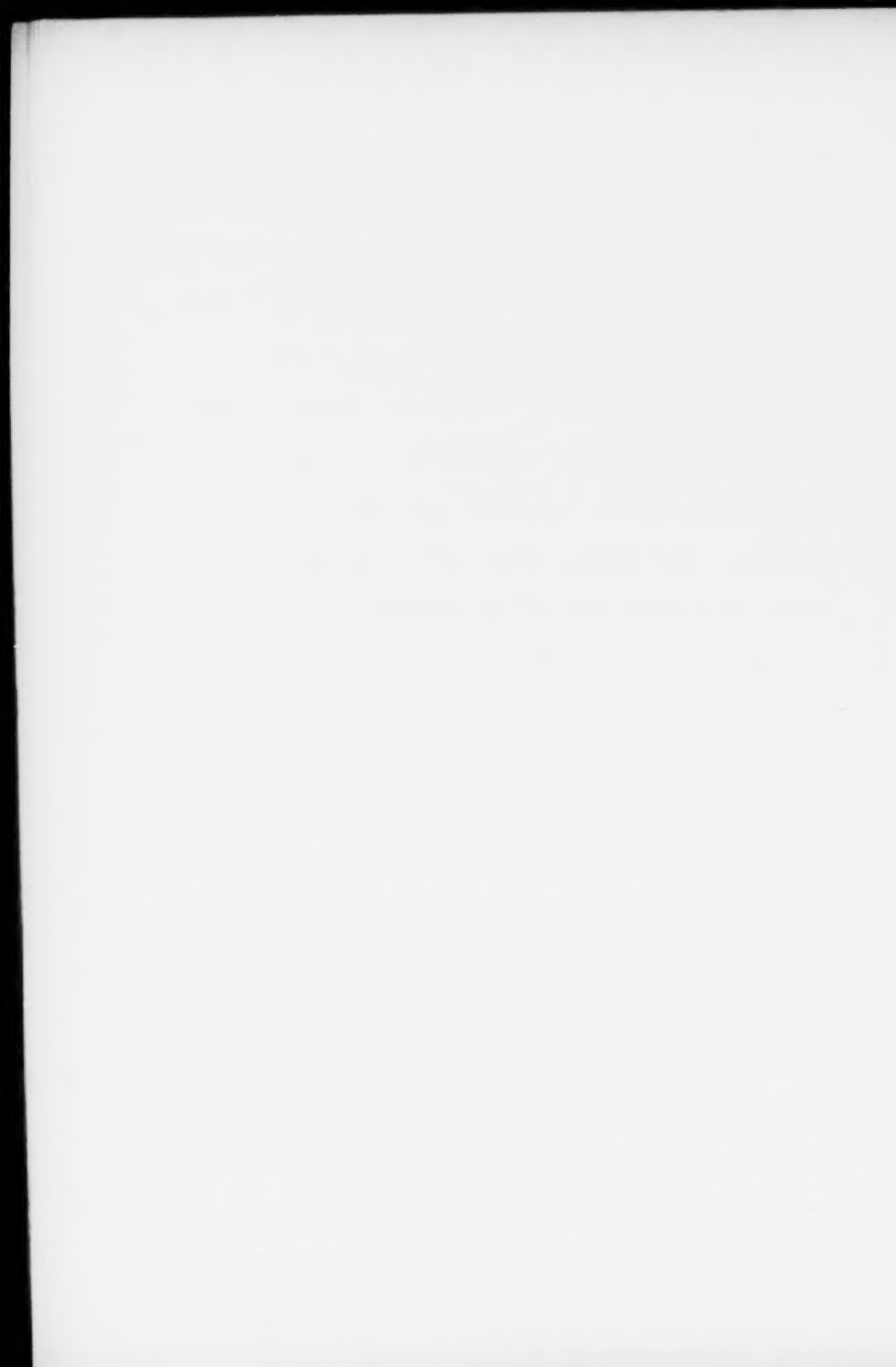
Appellant, Rita Iris Fishman, was convicted by a jury for the murder of her husband. The jury assessed her punishment at ten years' confinement in the Texas Department of Corrections. Appellant timely filed a written notice of appeal and, in accordance with Tex. R. App. P. 53(j)(2), filed an affidavit of indigency requesting a free statement of facts and transcript.



After a hearing was held on the indigency issue, the trial court entered an order finding that appellant was not indigent. From this order appellant presents this appeal asserting eight points of error.

By points one, three, four, five, seven, and eight, appellant contends that the trial court abused its discretion in finding appellant was not indigent and, thus, deprived her of an appeal in violation of the state and federal constitutions. She further requests that the court provide her with a free appellate record of the jury trial and related proceedings.

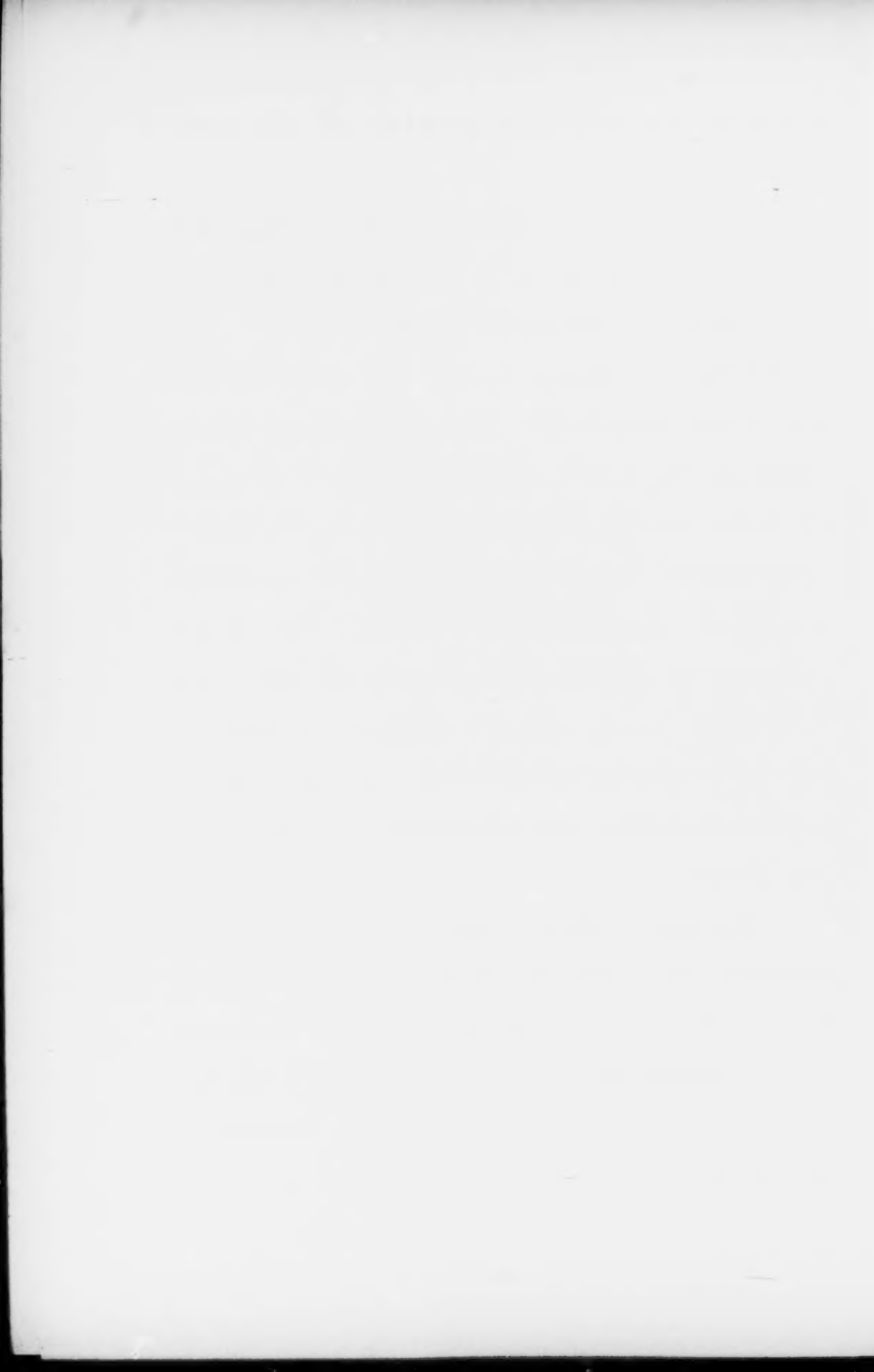
The State contends that the record does not affirmatively show that the trial court abused its discretion in finding that appellant was not indigent. The State argues that appellant did not prove that she was unable to pay for all or a portion of the record or, alternatively, provide



security for all or a portion of the same.
We agree.

The record reflects that appellant filed with the trial court an affidavit of indigency asserting that she had "insufficient money, property, or assets of any kind available to pay for or give security in order to pay for the statement of facts and the transcript in this cause." (emphasis added). Appellant further requested the court to order the court reporter to furnish a statement of facts and transcript at no expense to her. A hearing was conducted on the matter. At the hearing appellant called two witnesses to testify on her behalf.

Cynthia Garza, the official court reporter for the 357th District Court in Cameron County, testified that she recorded the statement of facts at appellant's murder trial. Garza testified that the statement of facts consisted of approximately 2,000

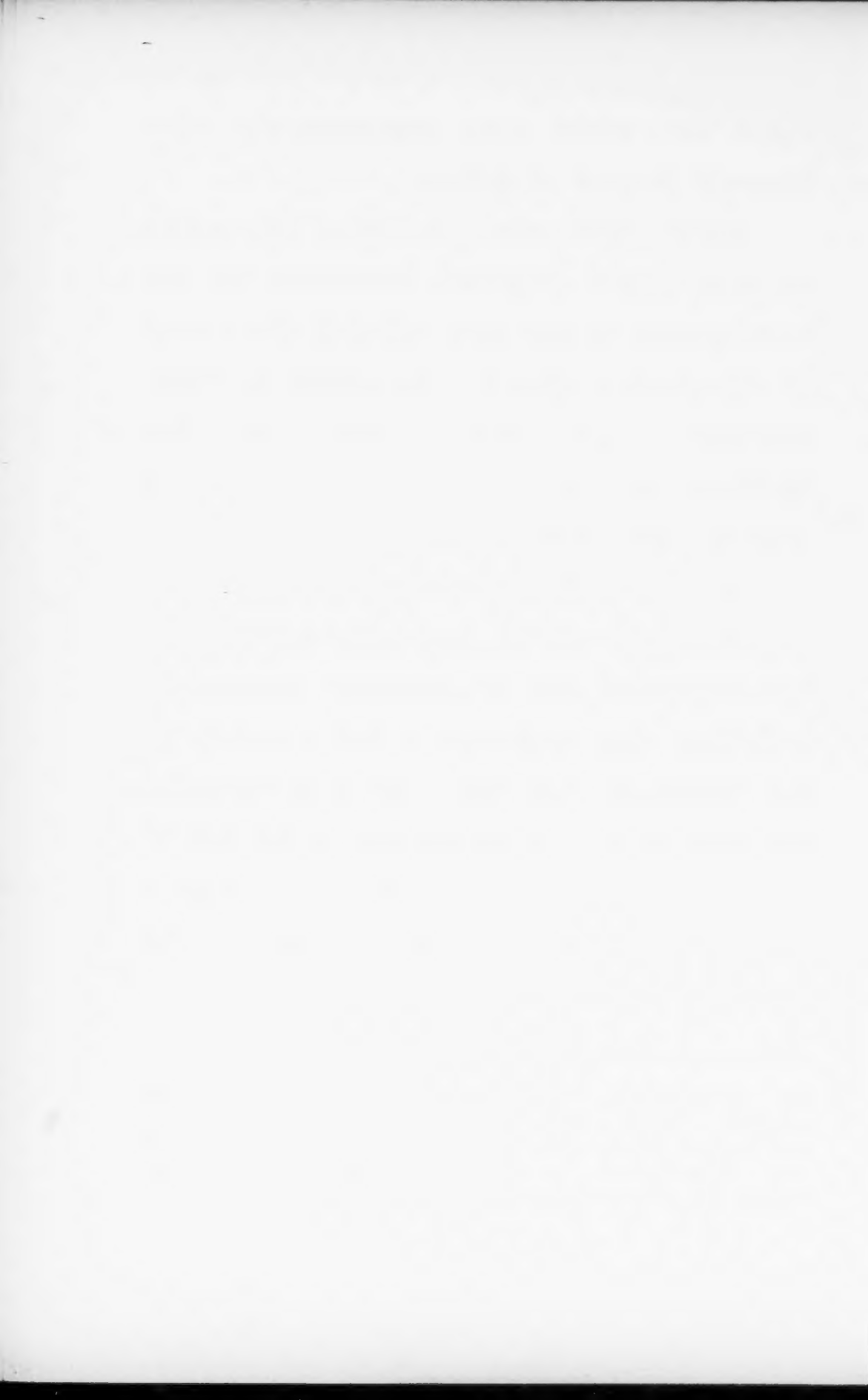


pages and would cost approximately nine thousand dollars to prepare.

Carlos Vela, the guardian of the estate of appellant's daughter, testified at the hearing that he was familiar with the extent of appellant's assets. According to Vela, appellant had been unemployed for approximately 10 to 13 years and had a negative net worth.

Vela testified that appellant's assets consists only of her community interest in her homestead and an adjacent lot. Vela testified that appellant's 1/2 interest in her homestead and the 1.38 acre adjacent lot were valued at approximately \$42,000.^{1/} He further testified that appellant's outstanding share of the mortgage on the homestead was approximately \$13,000.

1/ An inventory, appraisalment, and list of claims that was filed with the court reflects that the total appraised value of the homestead is \$69,500, and the total value of the other property is \$14,500.00.



Likewise, Vela introduced appellant's 1987 tax return which shows that her adjusted gross income of 1987 was \$5,707.00. The tax return also shows that in 1987 appellant declared an additional income of \$7,403.17; however, Vela testified that this income was from interest earned on accounts held for the benefit of appellant's daughter. The record reflects that Vela prepared an inventory, appraisal, and list of claims for the estate of appellant's daughter. This inventory was filed with the trial court and, during the indigency hearing, the court took judicial notice of the document. This document reveals that appellant's daughter inherited \$147,518.44 from her father's death, which was placed in trust with the U.S. District Clerk and deposited in the First City National Bank in Houston, Texas. According to Vela, appellant initially received the interest on this money, but that a judge for the U.S.



District Court ordered that those amounts now be paid to the guardian of the daughter's estate.

Vela further testified that appellant had two money judgments entered against her. On July 21, 1988, a hearing was held for the appointment of a permanent guardian for appellant's daughter. At the hearing, the judge ordered appellant to reimburse her daughter's estate for the amount of \$39,154.76. Vela also testified that he knew that a wrongful death civil action had been brought against appellant which resulted in a money judgment being entered against her. Vela, however, was not aware of the amount of this judgment.

Although appellant's witnesses were cross-examined, the State did not introduce any evidence at the indigency hearing. The State merely asked the court to make the record reflect that appellant had retained two lawyers to represent her.

It is well established that an appellate review of criminal convictions is provided in this state; therefore, a trial judge has a duty under the federal and state constitutions to provide an indigent defendant with an adequate record on appeal. Griffin v. Illinois, 351 U.S. 12 (1956); Abdnor v. State, 712 S.W.2d 136, 139 (Tex. Crim. App. 1986).

Tex. R. App. P. 53(j)(2) provides that:

Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge. After hearing the motion, if the court finds that the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, the court shall order the reporter to furnish the statement of facts . . . (emphasis ours).

A determination of indigence must be made on a case by case basis. Abdnor, 712 S.W.2d at 141; Zanghetti v. State, 582 S.W.2d 461

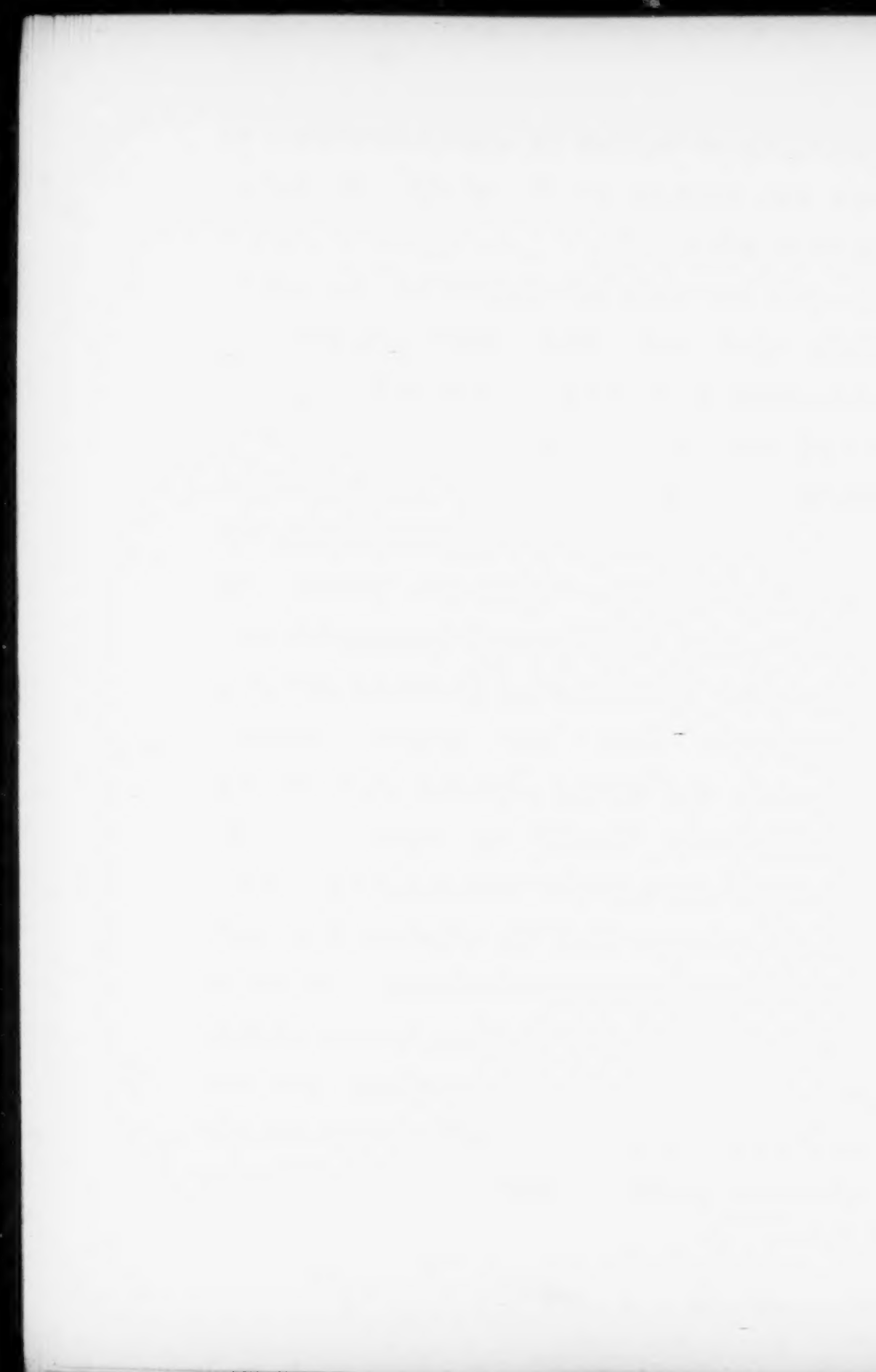
(Tex. Crim. App. 1979). The determination is to be made at the time of the appeal and not at the time of trial. Barber v. State, 542 S.W.2d 412 (Tex. Crim. App. 1976). Likewise, the court is to consider the financial condition of the appellant and not that of his parents or other relatives. Abdnor, 712 S.W.2d at 142; Ex Parte King, 550 S.W.2d 691 (Tex. Crim. App. 1977).

The factors to be considered in deciding the issue of indigency are the nature of the defendant's employment, the amount of the defendant's earnings and expenses, and the defendant's ability to secure a bond and retain counsel. Turner v. State, 725 S.W.2d 409, 410 (Tex. App.---Houston [1st Dist.] 1987, no pet.). However, an appellant will not be deprived of his right to a free statement of facts on appeal merely because he was represented by retained counsel at trial. Abdnor, 712 S.W.2d at 142. Retained trial counsel is



not bound to furnish an appellate record at his own expense or to handle the appeal without a fee. Id.

In the case now before us, we cannot find that the trial court abused its discretion in failing to find that appellant could not pay for or give security for a \$9,000 statement of facts. Appellant did not introduce any evidence concerning her living expenses. Although there was evidence that appellant had been unemployed, the record reflects that appellant was able to secure bond and retain counsel. Likewise, the record reflects that she had approximately \$30,000 in equity in her homestead and adjacent real property. There was no evidence that the adjacent 1.38 acre lot was mortgaged, and there was no evidence that a judgment lien had been levied against it. Furthermore, the appellant did not introduce any evidence demonstrating why the adjacent property could not legally be



incumbered or sold in order to provide security or pay for the statement of facts and transcript.

We, therefore, refuse to hold that the trial court abused its discretion. Accordingly, we overrule appellant's first, third, fourth, fifth, seventh, and eighth points of error.

By her second point of error, appellant contends that the court, in making its determination, erroneously considered only oral testimony and did not consider documentary evidence which had been entered into evidence and judicially noticed by the trial court. We have reviewed the record and find appellant's contention without merit and not supported by the record. Appellant's second point is overruled.

Appellant further assists by point six, that the prosecutor committed constitutional misconduct in opposing her prima facie case, "with nothing but lawyer



talk." Again, we have considered appellant's complaint and find it to be without merit. Accordingly, we overrule appellant's sixth point of error.

Having found no reversible error, we affirm the judgment of the trial court.

/s/
FORTUNATO P. BENAVIDES, Justice

Opinion ordered published. Tex.R.App. 90

Opinion delivered and

filed this the 20th

day of April, 1989.



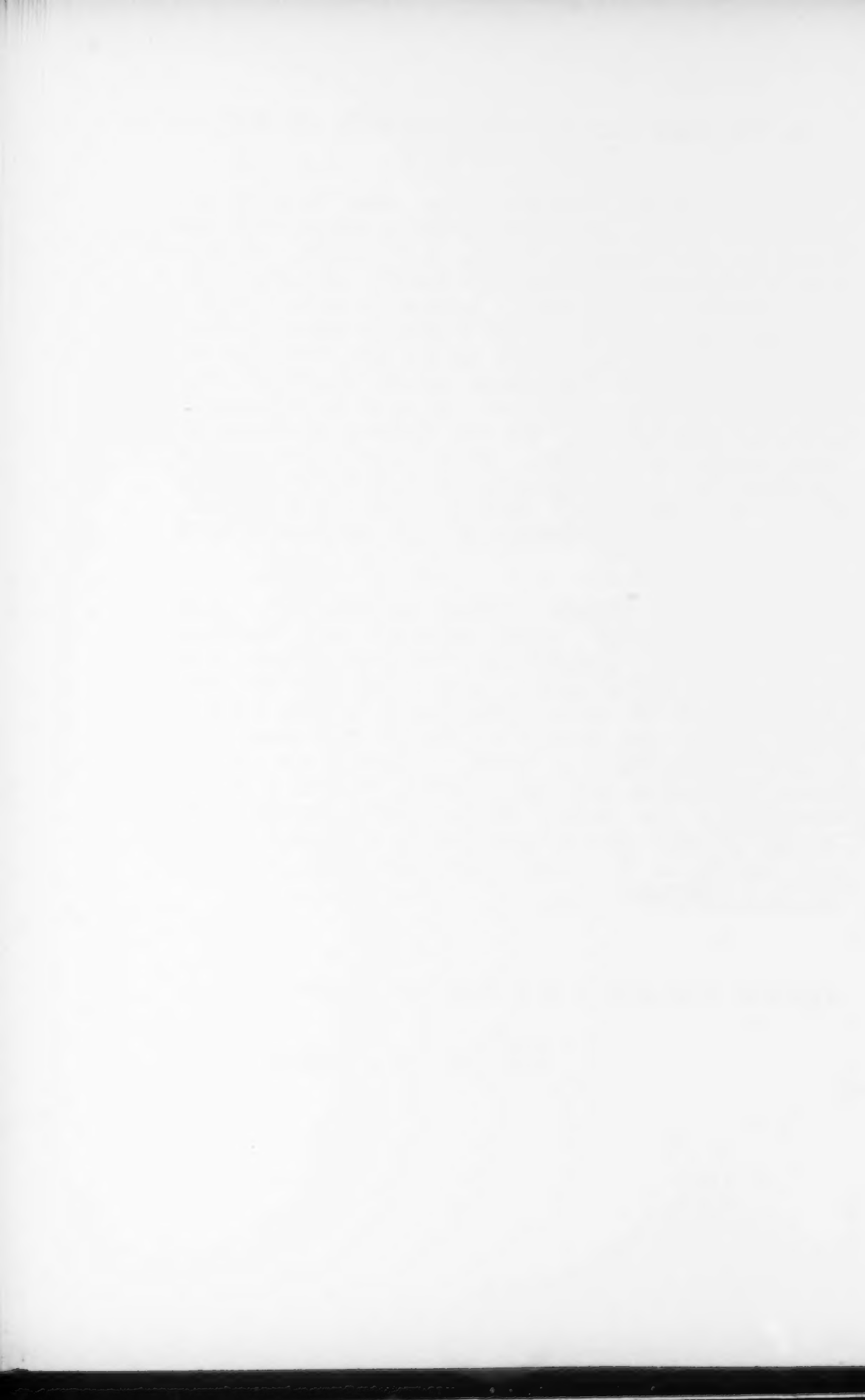
IN THE NAME AND BY THE AUTHORITY OF THE
STATE OF TEXAS

THE GRAND JURORS, for the County of Cameron, State aforesaid, duly organized as such at the January Term, A.D. 1988, of the 107th Judicial District Court in and for said County, upon their oaths in said Court, present that RITA IRIS FISHMAN hereinafter called Defendant, on or about the 6th day of June A.D. One Thousand Nine Hundred and Eighty-one and anterior to the presentment of this indictment, in the County of Cameron and State of Texas, did then and there unlawfully, intentionally and knowingly cause the death of SAMUEL RICHARD FISHMAN, the deceased, by SHOOTING THE DECEASED WITH A FIREARM,

AND THE GRAND JURORS AFORESAID, upon their Oaths in said Court, do further present that Defendant, on or about the above mentioned date, and anterior to the presentment of this Indictment in the County of Cameron and State of Texas did then and there unlawfully, with intent to cause serious bodily injury, commit an act clearly dangerous to human life that caused the death of the above mentioned deceased, such act being as follows: SHOOTING THE DECEASED WITH A FIREARM ,

against the peace and dignity of the State.

/s/
Foreman of the Grand Jury



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS) (IN THE 357TH
VS.) (DISTRICT COURT OF
RITA IRIS FISHMAN) (CAMERON COUNTY,
 TEXAS

JUDGMENT ON JURY VERDICT OF GUILTY
PUNISHMENT FIXED BY THE JURY NO
PROBATION GRANTED

Judge Presiding: Rogelio Valdez Date of Judgment: April 1988

Attorney for State: Ricardo Lara

Attorney for Defendant: Thomas Sullivan

Offense Convicted Of: Murder

Degree: Felony 1st Degree	Date Offense Committed: June 6, 1981
---------------------------	--

Charging
Instrument: Indictment

Plea: Not Guilty

Jury Verdict: Guilty
Foreman: Phillip Turner

Plea to Enhancement Paragraph(s)	N/A	Enhancement Paragraph(s):	N/A
----------------------------------	-----	---------------------------	-----

Findings on Use of Deadly Weapon:

Affirmative finding that a deadly weapon was used in the commission of this offense was made by the jury.



Date Sentence Imposed: April 6, 1988
Costs: \$75.00

Punishment and Place
of Confinement: Ten (10) years TDC

Date to Commence: April 6, 1988

Time Credited: Total amount of
 Restitution Reparation: N/A

Concurrent Unless
Otherwise Specified: N/A

Be it REMEMBERED that on the 28th day of March, 1988, this cause was called to trial and the State appeared by her Assistant Criminal District Attorney, and the Defendant, Rita Iris Fishman, appeared in person, her counsel by employment, the Hon. Thomas Sullivan also being present, and the Defendant, having been duly arraigned, pleaded Not Guilty and both parties announced ready for trial; thereupon a jury of good and lawful persons, to wit: Phillip Turner and eleven others, was duly selected, empaneled and sworn according to the law and charged by the Court on separation;



whereupon said cause was recessed until March 29, 1988.

THEREAFTER, on March 29, 1988, the indictment was read to the jury and the Defendant entered her plea of Not Guilty thereto whereupon the State introduced evidence, whereupon said cause was recessed until March 30, 1988.

THEREAFTER, on March 30, 1988, the State continued to introduce evidence whereupon said cause was recessed until March 31, 1988.

THEREAFTER, on March 31, 1988, the State continued with their evidence and rested. Defendant made motion for directed verdict and was denied by the Court.

Defendant introduced evidence and said cause was recessed until April 4, 1988. Thereafter, on April 4, 1988, the defendant continued with their evidence and rested. Both sides offered rebuttal evidence. All



parties closed and the Jury was sent home until April 6, 1988.

THEREAFTER, on April 6, 1988, the charge was prepared and submitted to all counsel. The Court charged the jury as to the law applicable to said cause and argument of counsel for the State and the Defendant was duly heard and concluded, and the jury retired in charge of the proper officer to consider their verdict, and afterward was brought into open court by the proper officer, the Defendant and her counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

"We, the Jury, find the Defendant, RITA IRIS FISHMAN GUILTY OF MURDER AS CHARGED IN THE INDICTMENT.

S/ Phillip Turner
Foreman



SPECIAL ISSUE

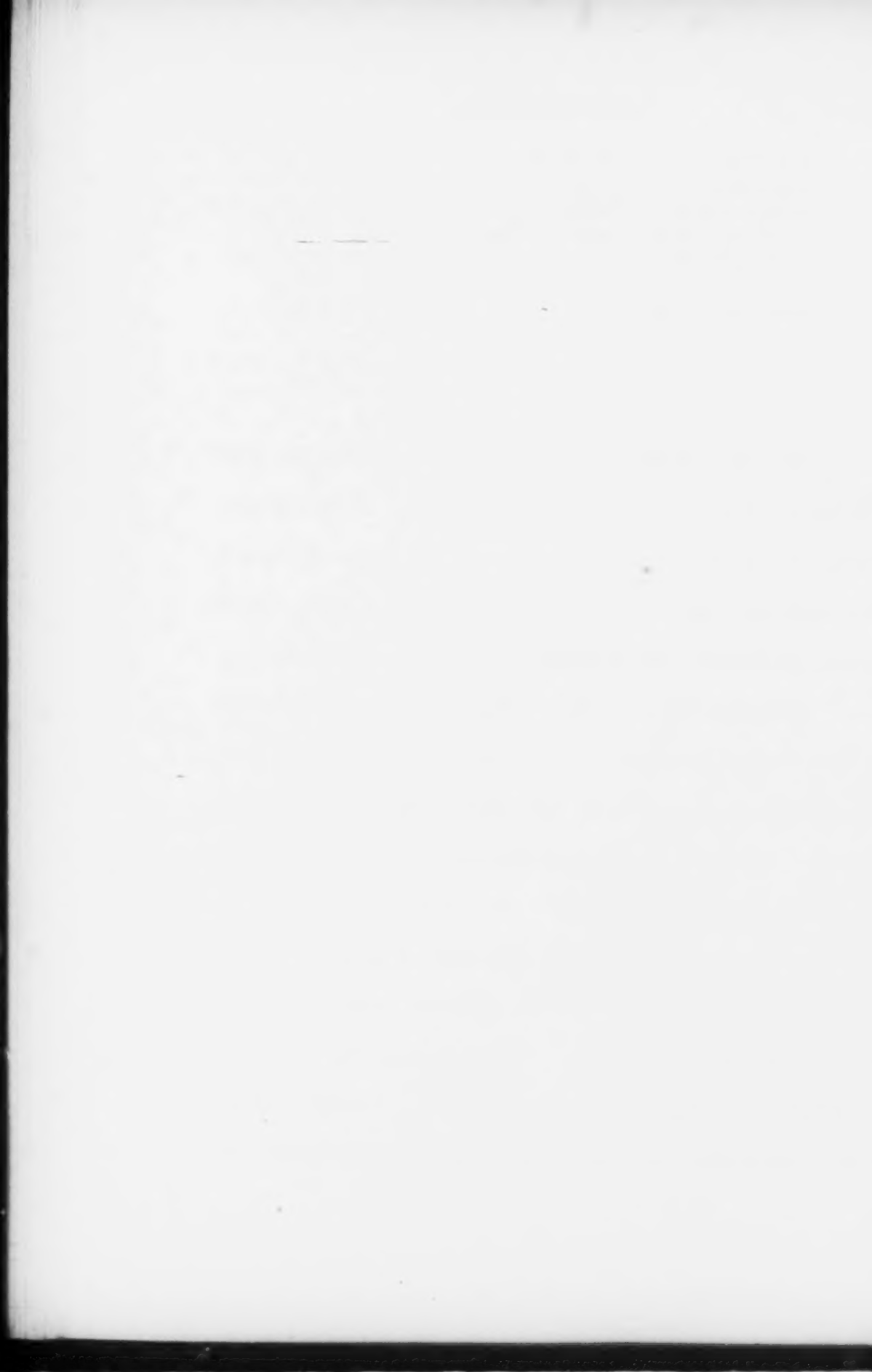
Do you find from the evidence beyond a reasonable doubt that the Defendant, RITA IRIS FISHMAN, used a deadly weapon during the commission of the offense for which you have found her guilty.

You will answer "Yes" or "No". Yes

S/ Phillip Turner
Foreman"

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Rita Iris Fishman, is guilty of the offense of Murder as found by the jury, and that said offense was committed on June 6, 1981.

THEREUPON, the Defendant, having previously elected in writing to have her punishment assessed by the same jury, the same jury was duly empaneled to assess said Defendant's punishment in said cause, and the evidence submitted for the State and for the Defendant was duly heard, and at the conclusion of such evidence, the Court charged the jury with additional instructions as to the law applicable to



punishment of said cause and arguments of State and Defendant were duly heard and concluded and the jury retired in charge of the proper officer to consider their verdict as to Defendant's punishment, and thereafter returned into open court, accompanied by the proper officer, the Defendant and her counsel being present, and in due form of law, the following verdict, which was received by the Court is here now entered upon the Minutes of the Court, to wit:

"We, the Jury, having found the Defendant, Rita Iris Fishman, Guilty of Murder as charged in the indictment, assess her punishment at confinement in the Texas Department of Corrections for 10 years, being not less than Five (5) years nor more than Ninety-nine (99) years, and assess a fine of \$ -0-. (Answer in dollars and cents, not exceeding \$10,000.00 or "None").

S/Phillip Turner
Presiding Juror"

IT IS, THEREFORE, CONSIDERED AND ADJUDGED BY THE COURT that the Defendant, Rita Iris Fishman, is guilty of the offense of Murder as found by the Jury, and that she



be punished, as found by the Jury, that is by confinement in the Texas Department of Corrections for a period of ten (10) years and that the State of Texas do have and recover of and from said Defendant all costs in this prosecution, for which execution may issue. The Court has made and hereby makes an affirmative finding that the Defendant, Rita Iris Fishman, used a deadly weapon during the commission of this offense as found by the Jury and that the deadly weapon used by the Defendant was a firearm and this affirmative finding is made a part of this sentence in accordance with the provisions of Article 42.12, Section 3f(a) (2) Code of Criminal Procedure of the State of Texas. And thereupon, the Defendant, Rita Iris Fishman, was asked by the Court whether she had anything to say why said sentence should not be pronounced against her, and she answered nothing in bar thereof. Whereupon, the Court proceeded, in the presence of the



said Defendant, Rita Iris Fishman, to pronounce sentence against her as follows:

It is the order of the Court that the Defendant, Rita Iris Fishman, who has been adjudged to be guilty of Murder and whose punishment has been assessed by the Jury at confinement in the Texas Department of Corrections for a term of ten (10) years, be delivered by the Sheriff of Cameron County, Texas, immediately to the Director of Corrections of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and the said Rita Iris Fishman shall be confined in said Texas Department of Corrections for a term of ten (10) years, in accordance with the provisions of the law governing the penitentiaries and the Texas Department of Corrections; it is further ordered by the Court that the Defendant be credited on this sentence with 000 days, on account of the time spent in jail in said cause since her



arrest and confinement until sentence was pronounced by the Court. And the said Rita Iris Fishman is hereby remanded to jail until said Sheriff can obey the directions of this sentence.

SIGNED FOR ENTRY: April 21, 1988.

/s/ Rogelio Valdez
Judge Presiding



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS § IN THE 357TH
VS. § DISTRICT COURT OF
RITA IRIS FISHMAN § CAMERON COUNTY,
 TEXAS

DEFENDANT'S AFFIDAVIT OF INDIGENCY

BEFORE ME, the undersigned authority,
personally appeared the above Defendant, who
being by me duly sworn on oath said:

"My name is RITA IRIS FISHMAN
and I am the Defendant in the above styled
and numbered cause. On April 21,
1988, the judgment and imposition of
sentence was entered against me in this
cause. I have given Notice of Appeal to the
Court of Appeals for the Thirteenth
Supreme Judicial District of Texas, sitting
in Corpus Christi, Texas. Other than my
personal possessions and several other
assets, having a total value of much less
than \$9,000, and my undivided interest in
one-half of our residence. I am indigent
and live on a very limited income. After
normal living expenses are provided for, I
have insufficient money, property or assets
of any kind available to pay for or give
security in order to pay for the Statement
of Facts or Transcript in this cause. I have
been informed that the trial court reporter
estimates that she will need \$9,000 to pay
the expense of preparing the statement of
facts in the above case. I am unable to pay
the reporter that \$9,000. I hereby request
that the Court order the court reporter to



furnish a Statement of Facts of the entire trial proceedings at no expense to me and to further order the Clerk to furnish the Transcript in this cause at no expense to me."

/s/ Rita Iris Fishman
AFFIANT

SWORN TO AND SUBSCRIBED before me, this
the 23rd day of June, 1988.

/s/ Emma Garcia
Notary Public In and For
The State of Texas



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS	§	IN THE 357TH
VS.	§	DISTRICT COURT OF
RITA IRIS FISHMAN	§	CAMERON COUNTY, TEXAS

O R D E R

On this the 23rd day of June, 1988, the District Clerk presented to the Court the Defendant's Affidavit of Indigency. It is ordered by the Court that the court's clerk shall promptly notify the parties' attorneys of record that this case is hereby set for a hearing on Defendant's said Affidavit on the 4th day of August, 1988, at 9:00 o'clock A.m.

/s/ Rogelio Valdez
JUDGE PRESIDING



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS : IN THE 357TH
VS. : DISTRICT COURT OF
RITA IRIS FISHMAN : CAMERON COUNTY,
TEXAS

O R D E R

On August 4, 1988, the above cause came on for consideration of Defendant, RITA IRIS FISHMAN'S Affidavit of Indigency. The State appeared by Assistant District Attorney, Rick E. Lara. The Defendant appeared in person and by attorneys, Thomas Sullivan and Joseph A. Connors, III. After hearing evidence and argument of counsel, the Court found the Defendant is not indigent.

IT IS ORDERED by the Court that this Defendant's Affidavit of Indigency be and the same is in all things denied.

SIGNED FOR ENTRY on this the 29th day of August, 1988.

/s/ Rogelio Valdez
JUDGE PRESIDING



CAUSE NO. 88-CR-87-E

THE STATE OF TEXAS	§	IN THE 357TH
VS.	§	DISTRICT COURT OF
RITA IRIS FISHMAN	§	CAMERON COUNTY, TEXAS

O R D E R

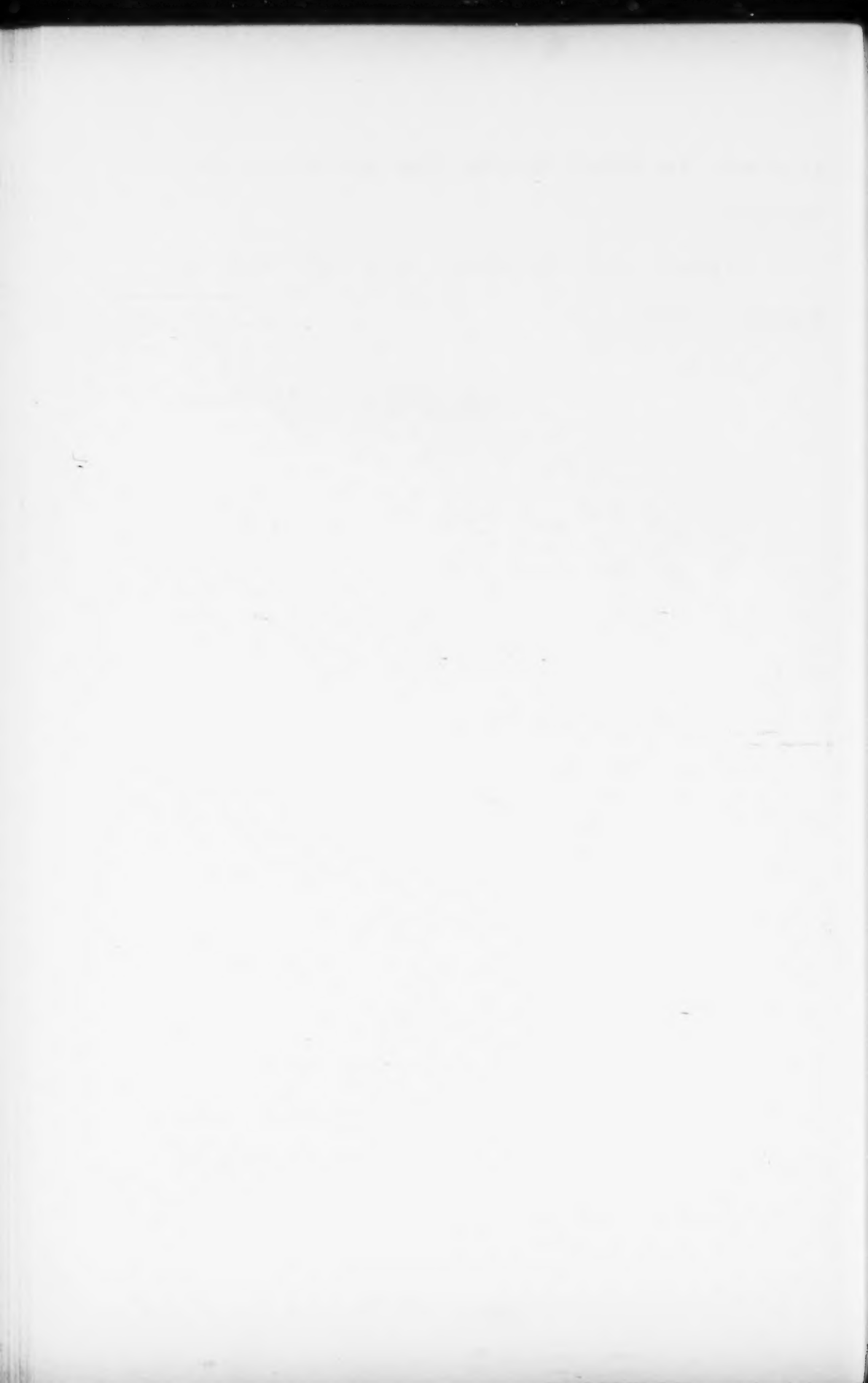
On this the 29 day of August, 1988, came on to be considered the request of defendant RITA IRIS FISHMAN, that the district court instruct both the district clerk to furnish the Court of Appeals a full transcript on indigency and the court reporter to furnish at no cost to her a statement of facts of the indigency hearing conducted in this case on the 4th day of August, 1988, for the purpose of her appeal on the issue of her indigency, and having considered the request, the court ruled. It is Ordered, Adjudged and Decreed by the Court that defendant RITA IRIS FISHMAN'S SAID requests be and the same are hereby



granted, to which action the defendant duly
excepts.

Signed and Entered this 29 day of
August, 1988.

/s/ Rogelio Valdez
JUDGE PRESIDING



Cause No. 22-582-A

ESTATE OF	§	ON THE COUNTY COURT
AMY MICHELLE FISHMAN,	§	AT LAW NO. 1
A MINOR	§	CAMERON COUNTY, TEXAS

ORDER APPOINTING PERMANENT GUARDIAN

On the 21st day of July, 1988, a hearing was held for the appointment of a permanent Guardian of the Person and of the Estate of Amy Michelle Fishman, a minor; and personally appeared Carlos F. Vela, Temporary Guardian of the Estate, the Department of Health and Resources, the Temporary Guardian of the Person and Rita I. Fishman, in person and, by and through her attorney and announced ready; the Court found that it had jurisdiction and venue over this matter and after hearing the evidence and the argument of counsel, the court was of the opinion and made the following Orders:



It is therefore ORDERED that Rita I. Fishman be and is hereby appointed Permanent Guardian of the Person Amy Michelle Fishman, a minor. It is further ORDERED that no bond will be required from said Guardian.

The court does however, find that the said Rita I. Fishman has used monies from the estate of said child for personal expenses which were the obligation of the natural parent of said child and hereby orders reimbursement of said expenses by Rita I. Fishman to the estate of Amy Michelle Fishman, a minor:

It is therefore ORDERED that Rita I. Fishman reimburse the amount of 39,154.75 dollars to the estate of Amy Michelle Fishman, a minor.

It is further ORDERED that Carlos F. Vela shall continue as Temporary Guardian of the estate of Amy Michelle Fishman, a minor, until a Permanent Guardian is appointed by



this court. Said Temporary Guardian shall continue to serve without bond.

It is further the ORDER of this Court that the Temporary Guardian shall file an Amended report in this case with regard to the inventory and appraisement of the Estate of said minor no later than August 12th, 1988.

SIGNED FOR ENTRY THIS 26th day of July, 1988.

/s/ Noe Robles
Judge Presiding



CAUSE NO. 88-CR-87-E

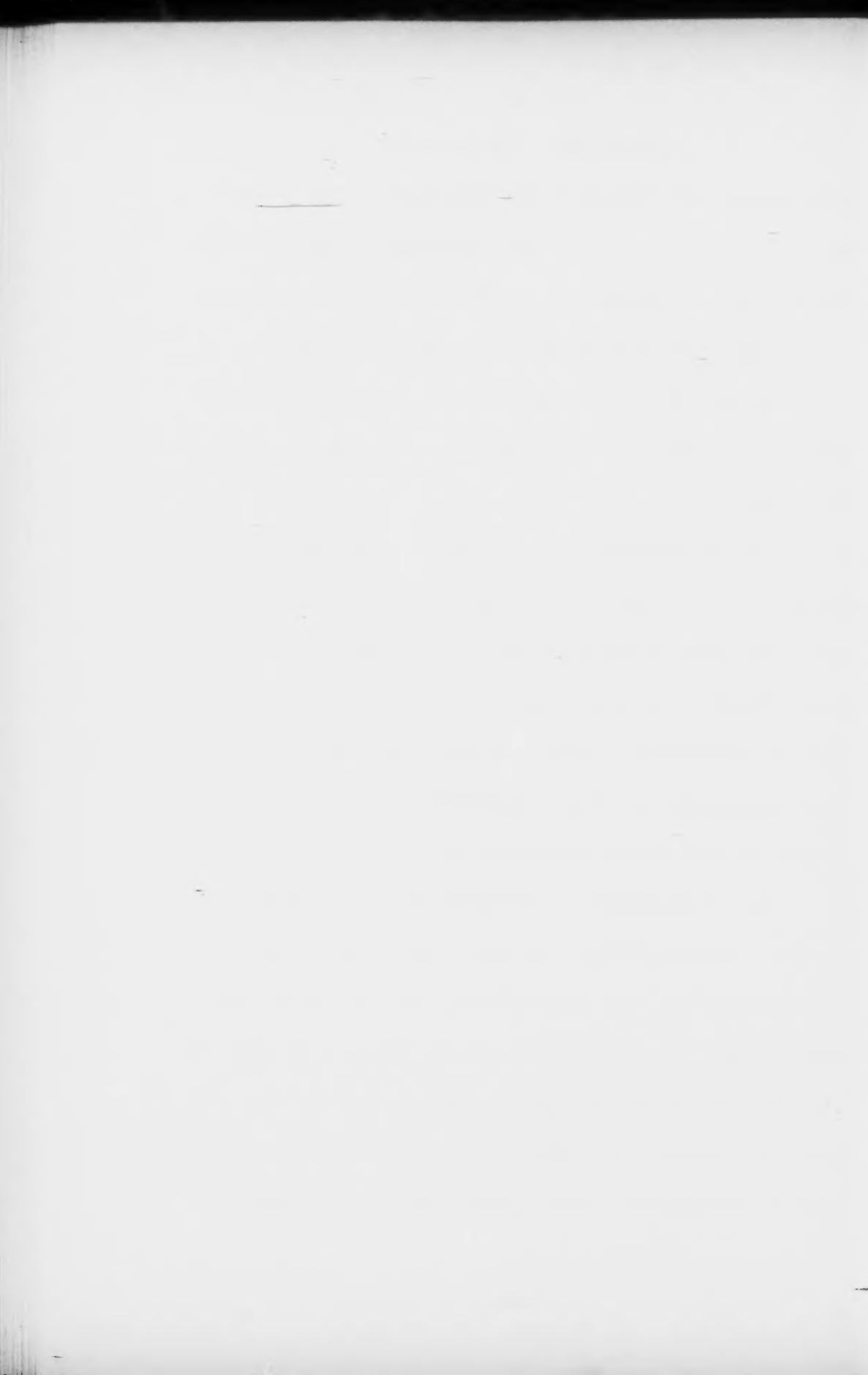
THE STATE OF TEXAS * IN THE DISTRICT COURT
*
VS. * OF CAMERON COUNTY, TEXAS
*
RITA IRIS FISHMAN * 357TH JUDICIAL DISTRICT

MOTION FOR NEW TRIAL OR ACQUITTAL

RITA IRIS FISHMAN, the Defendant now comes and files this motion for new trial, because:

1. The district court should set aside the jury's verdict and enter an acquittal because the homicide was as a matter of law justified, having occurred in self-defense while defendant was defending herself and the sanctity of her residence, of which she legally had sole possession.

2. To defendant's prejudice, the district court reversibly erred in failing, as requested by the defendant, to replace "her" for "his" in the final line of paragraph 11 in the Court's Charge to the Jury at the not guilty phase of the trial. This pronoun error confused the jury on an essential



defensive issue that when the jury was considering self-defense, the deceased's words, etc. had to be viewed only from the view point of her, the defendant, not that of his, the deceased, when the jury was considering self-defense.

3. To defendant's prejudice, the district court reversibly erred in failing to instruct the jury, as requested by defendant, that parole is not an issue for the jury and should not be considered by the jury, since parole is the exclusive prerogative of the Board of Parole and Pardons, and/or the Governor, as evidenced by the jury's "parole note, this jury considered parole during the deliberations. Defendant was harmed by the jury's consideration of parole during jury deliberations.

4. To defendant's prejudice, the district court reversibly erred in sustaining and excluding Opal Lynch's testimony as to what



the deceased's minor child Amy said in front of Ms. Lynch, the defendant and the deceased. Amy's comments and the deceased's immediate physical reactions thereto were admissable. See V. T. C. A. Penal Code 19.06 (1979). Such excluded evidence supported the defensive theory that Amy had been punished by the deceased by locking or closing Amy up in a dark closet. Further, it is the only incidence of outside, independent and non-familial corroboration of such family violence.

5. To defendant's prejudice, the district court reversibly erred in denying the requested defense instruction that before using deadly force, a person has no duty to retreat in one's own home. Without said requested instruction, the district court mislead the jury as to the defendant's lack of duty to retreat in the circumstances before the jury in the above case.



6. To defendant's prejudice, the district court reversibly erred in failing to instruct the jury on the defendant's right to defend her property and the sanctity of her residence, which residence had previously been judicially awarded solely to her to possess to the exclusion of the deceased.

7. To defendant's prejudice, the district court reversibly erred in not requiring the state to elect between counts one and two of the indictment. Defendant was harmed because all twelve jurors were not required to be unanimous in deciding the defendant was guilty of committing murder in one but not both of the manners alleged in counts one and two of the indictment in the above case.

8. To defendant's prejudice, the district court reversibly erred in overruling defendant's objection and assertion of the attorney-client privilege when the court

The first of these is the fact that the
the government has been very successful in
the past few years in reducing the
the rate of inflation. This has been
achieved by a combination of factors,
including a tight monetary policy and
a reduction in government spending.
The second factor is the fact that the
government has been successful in
reducing the rate of unemployment.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending. The third factor is the fact
that the government has been successful
in reducing the rate of interest.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending. The fourth factor is the fact
that the government has been successful
in reducing the rate of inflation.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending. The fifth factor is the fact
that the government has been successful
in reducing the rate of unemployment.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending. The sixth factor is the fact
that the government has been successful
in reducing the rate of interest.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending. The seventh factor is the fact
that the government has been successful
in reducing the rate of inflation.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending. The eighth factor is the fact
that the government has been successful
in reducing the rate of unemployment.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending. The ninth factor is the fact
that the government has been successful
in reducing the rate of interest.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending. The tenth factor is the fact
that the government has been successful
in reducing the rate of inflation.
This has been achieved by a combination
of factors, including a tight monetary
policy and a reduction in government
spending.

ordered defendant's counsel to produce certain photographs. Those photographs had been secured by defense counsel as a result of the attorney-client's communication and relationship. After receiving those photographs, the state introduced some of them before the jury.

9. To defendants' prejudice, the District Court reversibly erred in overruling defendant's timely objection to the admission of Joe Garza's opinion as a ballistic expert on the distance from which each shot was fired. Mr. Garza was not an expert in the area in question. Defendant was harmed because this unqualified opinion helped to destroy her defensive theory of self-defense. Such an unqualified opinion from Joe Garza could not assist the jury in determining if the closest shot was the first or last shot.

10. Thus, the above defendant requests that the court conduct a hearing on the above,



and grant an acquittal or at least a new trial.

Respectfully submitted
by Defendant's Attorneys,

/s/ Thomas Sullivan

Thomas Sullivan

Texas Bar No. 194918900

1185 FM 802, Suite 4

Brownsville, Texas 78520

(512) 544-4500

Joseph A. Connors III

Texas Bar No. 04705400

804 Pecan St.

McAllen, Texas 78502-5838

(512) 687-8217



VERIFICATION

THE STATE OF TEXAS

COUNTY OF CAMERON

BEFORE ME, the undersigned authority,
appeared THOMAS SULLIVAN, on the 5th of May,
1988 and who being by me duly sworn did
depose and state on his oath the following:

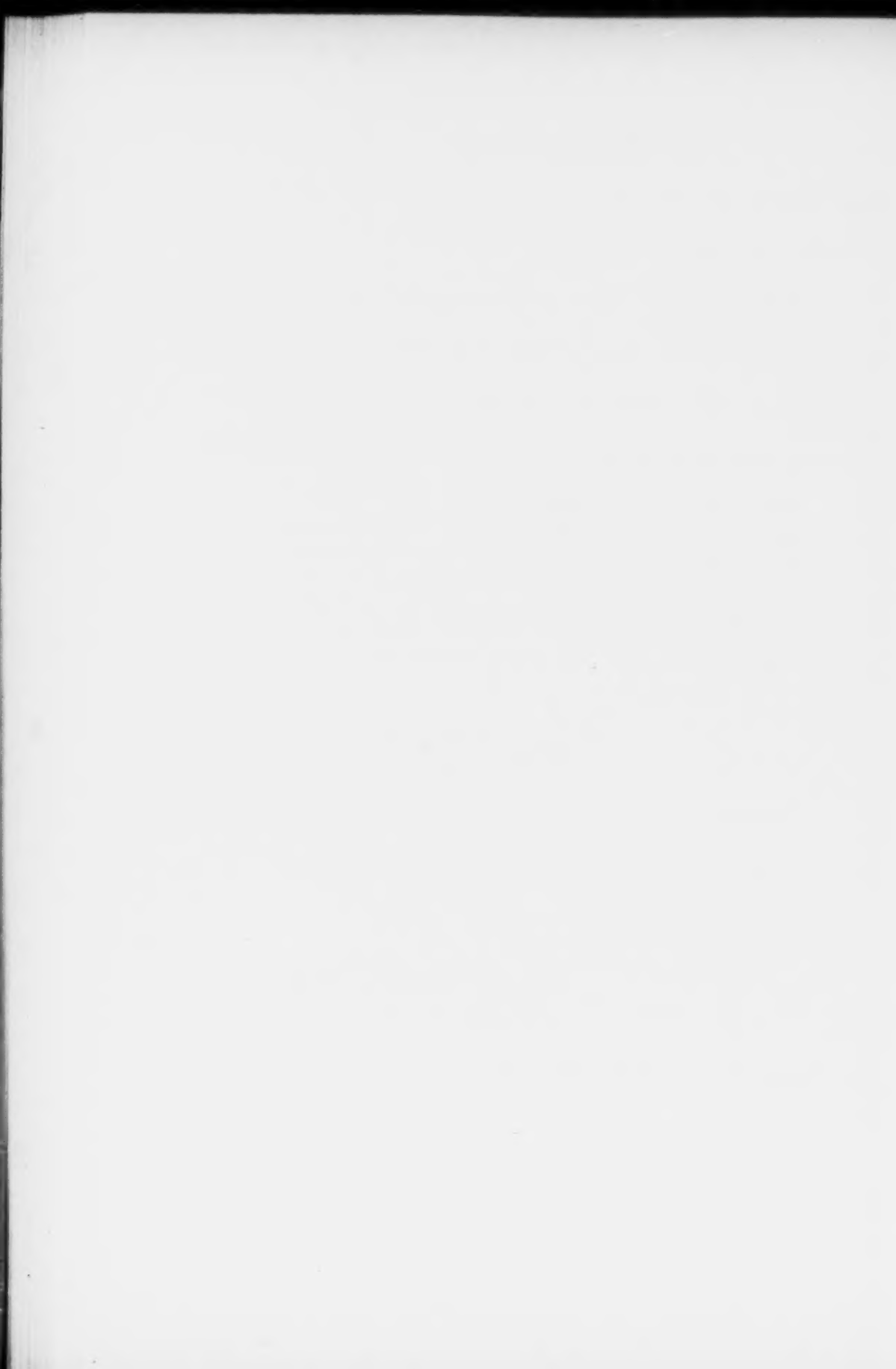
"My name is Thomas Sullivan, and I
am one of the defendant's counsel
in the above styled and numbered
cause. I have read the above and
foregoing motion and I hereby
swear that the facts contained
therein are true and correct.

/s/ Thomas Sullivan
Thomas Sullivan

SWORN TO AND SUBSCRIBED before me on
this the 5th day of May, 1988.

/s/ Jimmy Eaves
Notary Public In and for
the State of Texas

My commission expires: 07/07/90



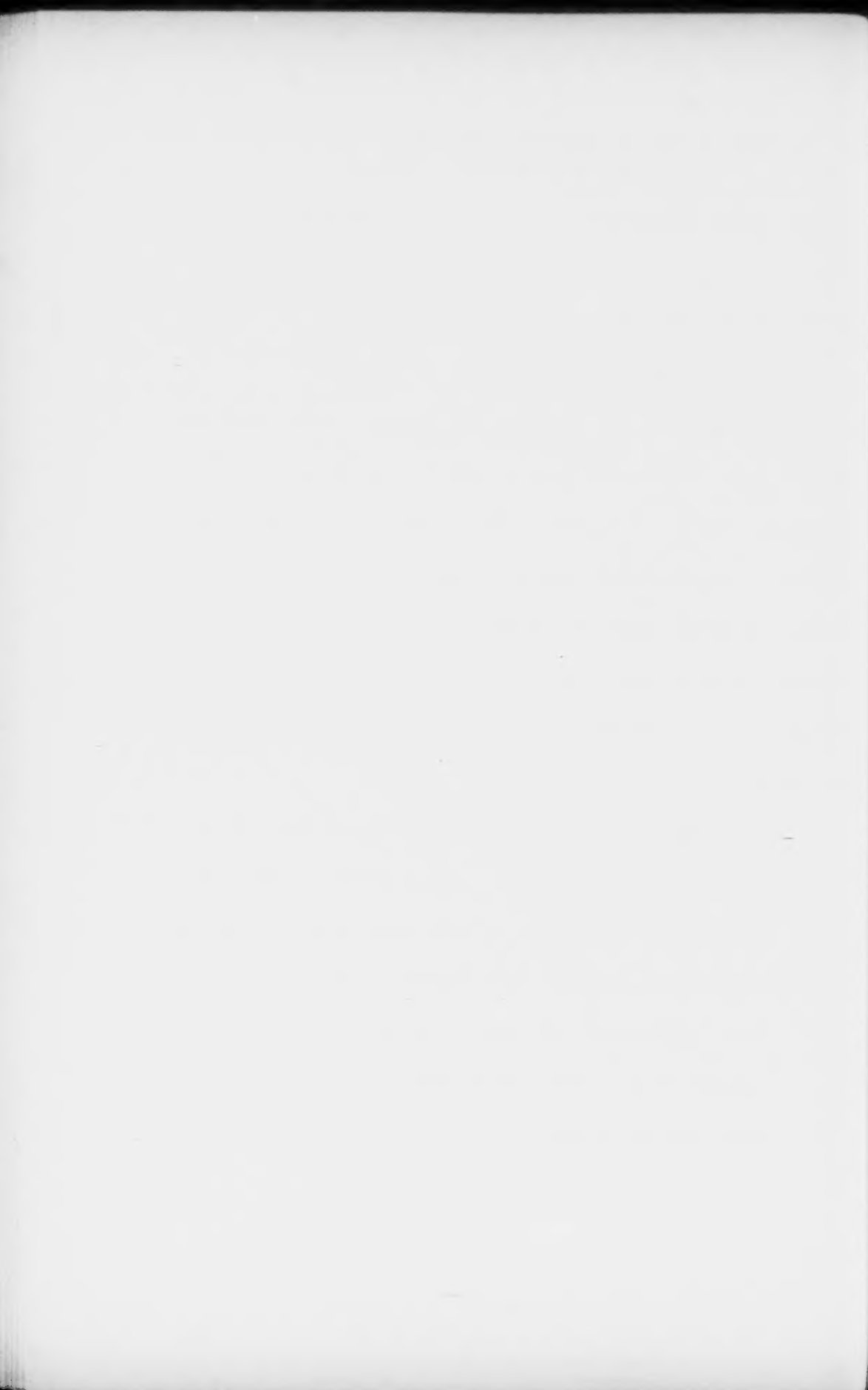
IN THE 13TH COURT OF APPEALS, SITTING IN
CORPUS CHRISTI, TEXAS

RITA IRIS FISHMAN § ON APPEAL
VS. § FROM CAMERON
THE STATE OF TEXAS § COUNTY, TEXAS

MOTION TO ABATE APPEAL

Pursuant to Hicks v. State, 544 S.W.2d 424, 426 (Tex.Cr.App. 1976) and Abnor v. State, 712 S.W.2d 136, 144 (Tex.Cr.App. 1986), appellant moves the Court to abate this appeal and to remand the cause to the trial court for action consistent with this Court's opinion. As grounds, appellant points out:

- (1) On August 4, 1988, the district court in effect orally concluded appellant was not indigent after hearing evidence on appellant's affidavit of indigency for purposes of obtaining an appellate transcript and statement of facts in the above case.



- (2) On August 12, 1988, appellant timely filed notice of appeal from that "non-indigency hearing". Attached is a true copy of that notice of appeal, etc.
- (3) Few further appellate steps can be performed by appellant until the record from the "non-indigency" hearing are filed in this Court of Appeals.

Respectfully submitted by
APPELLANT'S ATTORNEYS,

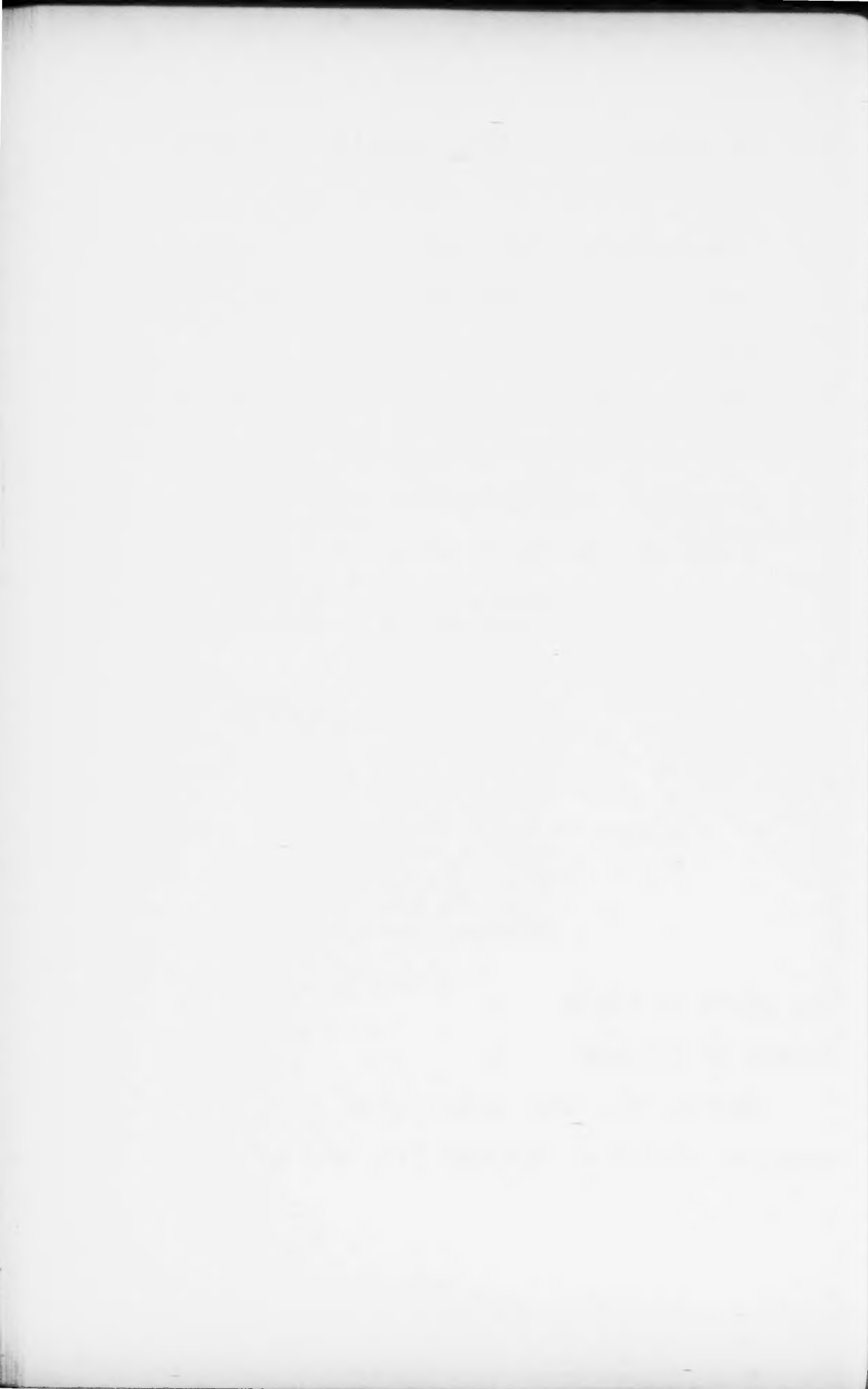
/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217

THOMAS SULLIVAN
Texas Bar No. 19491800
1185 FM 802, Suite 4
Brownsville, Texas 78520

THE STATE OF TEXAS §

COUNTY OF HIDALGO §

BEFORE ME, the undersigned authority,
appeared JOSEPH A. CONNORS III, who being by



me duly sworn did depose and state on his oath the following:

"My name is Joseph A. Connors III, and I am one of the appellant's counsel in the above styled and numbered cause. I have read the above and foregoing motion. I hereby swear that the facts contained therein are true and correct."

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III

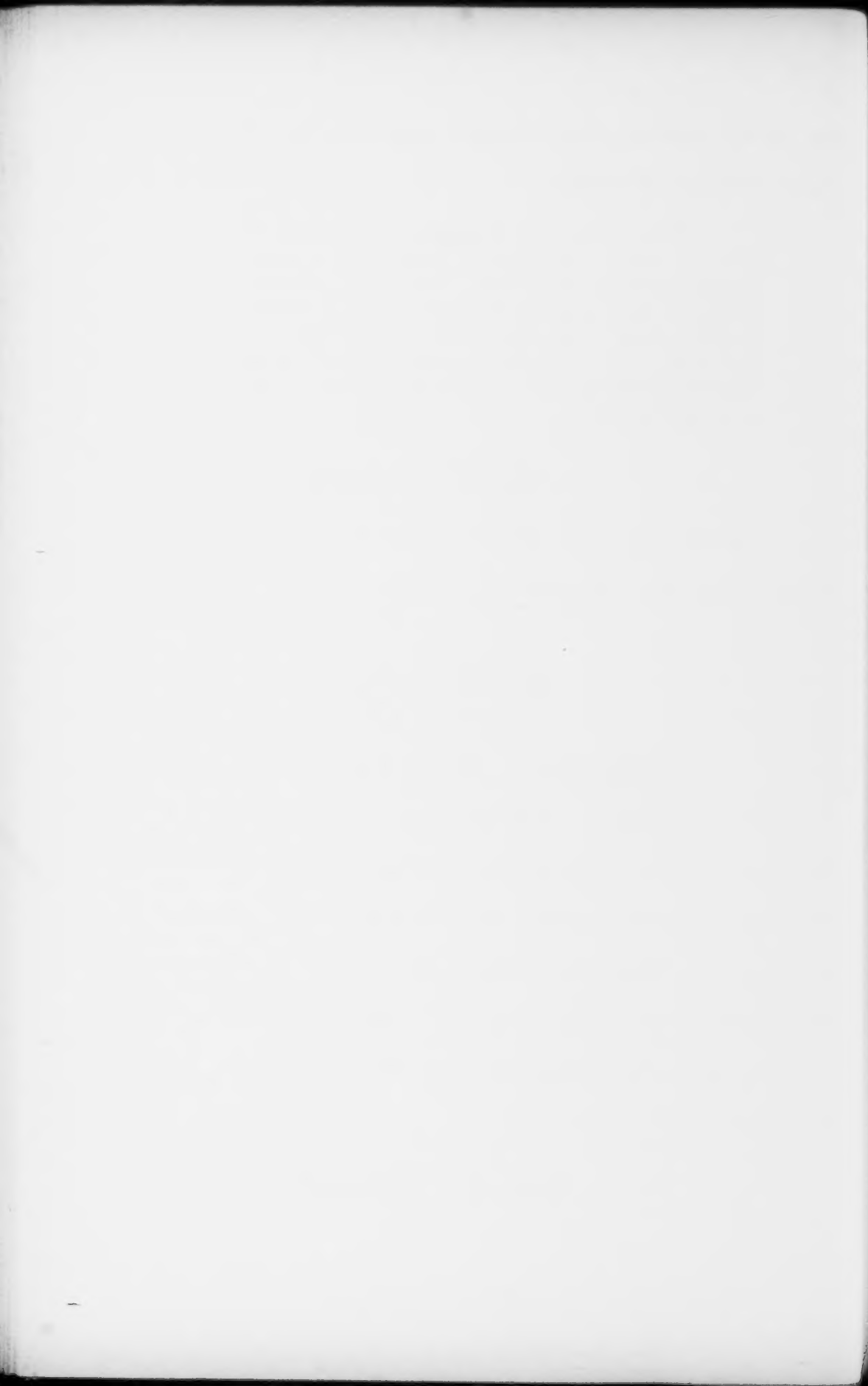
SWORN TO AND SUBSCRIBED before me on this 15th day of August, 1988.

/s/ Belia C. Cerda
Notary Public In And For
The State of Texas

CERTIFICATE OF SERVICE

I, JOSEPH A. CONNORS III certify that I mailed a copy of the foregoing Motion to the District Court, Judge Roy Valdez, and to the office of the Honorable Rick Lara, County and District Attorney of Cameron County, Texas; and to appellant on the 15th day of August, 1988.

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III



Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

August 31, 1988

Thomas Sullivan
Downey & Sullivan
Attorneys at Law
1185 FM 802, Suite 4
Brownsville, Texas 78521

Joseph A. Connors, III
Attorney at Law
P.O. Box 5838
McAllen, Texas 78502

Ben Euresti, Jr.
County Criminal District Attorney
974 E. Harrison
Brownsville, Texas 78520

RE: CASE NO. 13-88-00181-CR
TRIAL COURT CAUSE NO. 88-CR-87-E

STYLE: Fishman Rita Iris
V: The State of Texas

The appellant's motion to abate appeal
was denied by the Court on this day.

Respectfully yours,

BETH A. GRAY, Clerk

By /s/ Cathy Wilborn
Deputy



NO. 13-88-181-CR

IN THE TEXAS COURT OF APPEALS,
THIRTEENTH SUPREME JUDICIAL DISTRICT
AT CORPUS CHRISTI, TEXAS

RITA IRIS FISHMAN,	§ Appeal of Cause No.
Appellant	§ 88-CR-87-E
	§ From the 357th
VS.	§ District Court
	§ Cameron County, Texas
	§
	§ Hon. Rogelio Valdez
THE STATE OF TEXAS	§ Judge Presiding

BRIEF OF APPELLANT

[Note: In that brief, the appellant's
eight points of error read as
follows: see next page]



POINT OF ERROR NO. 1

The district court reversibly erred in denying appellant's affidavit of indigency, which was judicially noticed after being offered in the evidence (R. SI-10, 65; II-2-4), since the uncontroverted evidence of appellant's financial status left the district court no discretion under Tex.R.App.P. 53(j)(2) but to find appellant to be adequately indigent for purposes of obtaining at no personal cost the requested and designated appellate record of the jury trial and related proceedings.

POINT OF ERROR NO. 2

In determining the question of appellant's indigence the district court abused its discretion in limiting its consideration to only oral "evidence that I have heard" (R. II-28), since the court failed to consider the documentary evidence (R. SI-10, 20-49; SSI 2-3), which previously had been offered into evidence and judicially noticed (received in evidence) at appellant's request (R. II-2-4).

POINT OF ERROR NO. 3

On August 4, 1988, the district court abused its discretion in finding that appellant "is not indigent" (R. II-28, lines 17-18; SI-65).

POINT OF ERROR NO. 4

The district court abused its discretion in finding that appellant has at her disposal sufficient sums of money to obtain her own transcript (R. II-28, lines 18-20).



POINT OF ERROR NO. 5

In determining the question of appellant's indigence for purposes of obtaining a record on appeal, the district court abused its discretion in considering as relevant factors that appellant not only had retained counsel at the prior (motion for new trial) hearing but also is now being represented by attorneys Joseph Connors and Thomas Sullivan on August 4, 1988, (R. II-28-29, line 22 to line 3).

POINT OF ERROR NO. 6

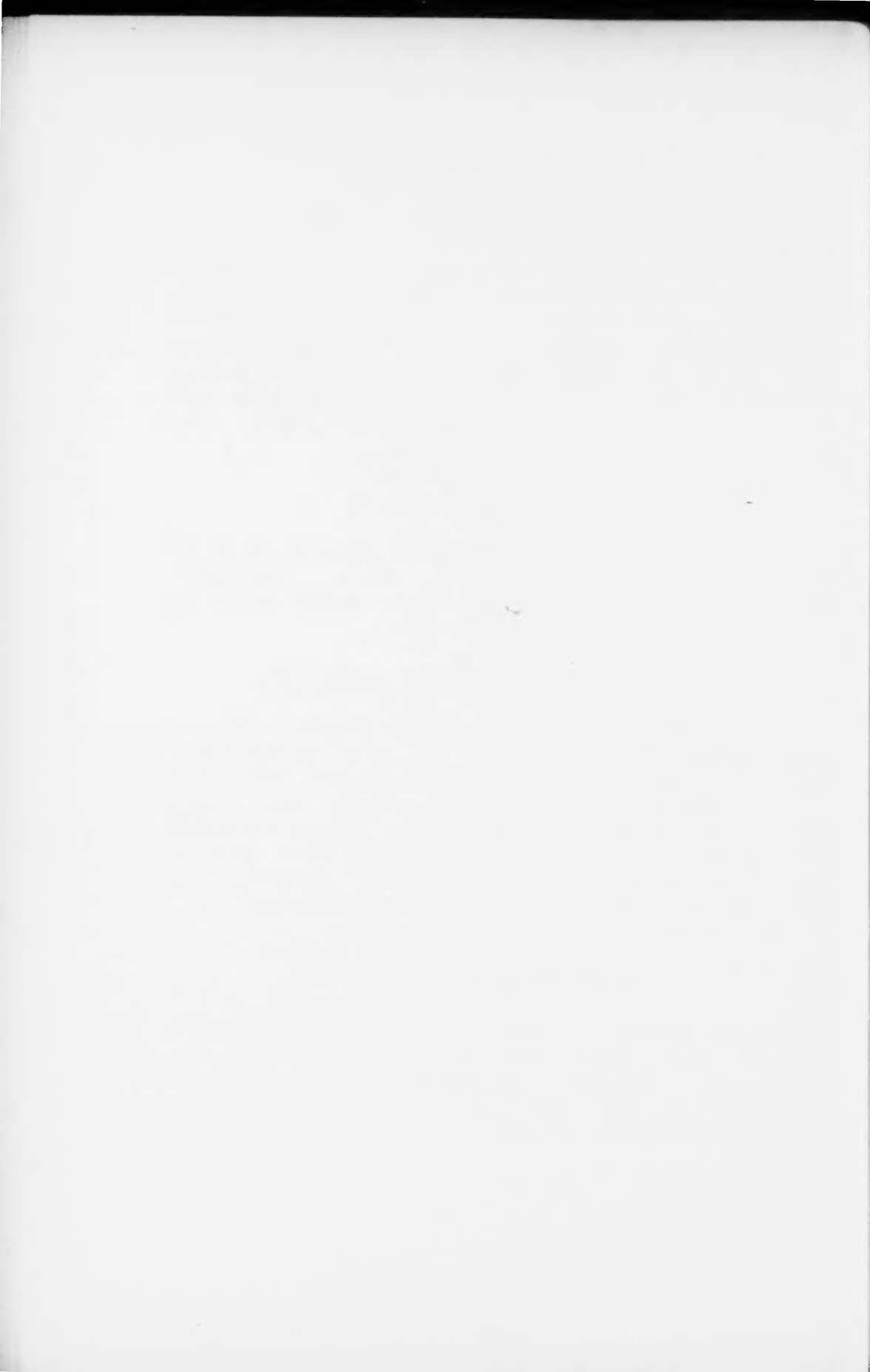
The prosecutor committed constitutional misconduct in opposing this indigent appellant's prima facie case with nothing but lawyer talk (R. II-23-29).

POINT OF ERROR NO. 7(A) AND 7(B)

By denying her any right of a meaningful merits appeal of the conviction in this case, the district court violated this indigent appellant's right to: (A) equal protection under the Fourteenth Amendment to the U.S. Constitution; and/or (B) due course of law under Article I, Section 19 of the Texas Constitution (R. II-28; SI-65).

POINT OF ERROR NO. 8

The district court violated appellant's rights not only to open access to the appellate courts guaranteed her under Section 13 of Article I of the Texas Constitution (R. II-28; SI-65).



NO. 13-88-181-CR

IN THE TEXAS COURT OF APPEALS,
THIRTEENTH SUPREME JUDICIAL DISTRICT
AT CORPUS CHRISTI, TEXAS

RITA IRIS FISHMAN,	§ Appeal of Cause No.
Appellant	§ 88-CR-87-E
	§ From the 357th
VS.	§ District Court
	§ Cameron County, Texas
	§
	§ Hon. R. Valdez
THE STATE OF TEXAS	§ Judge Presiding

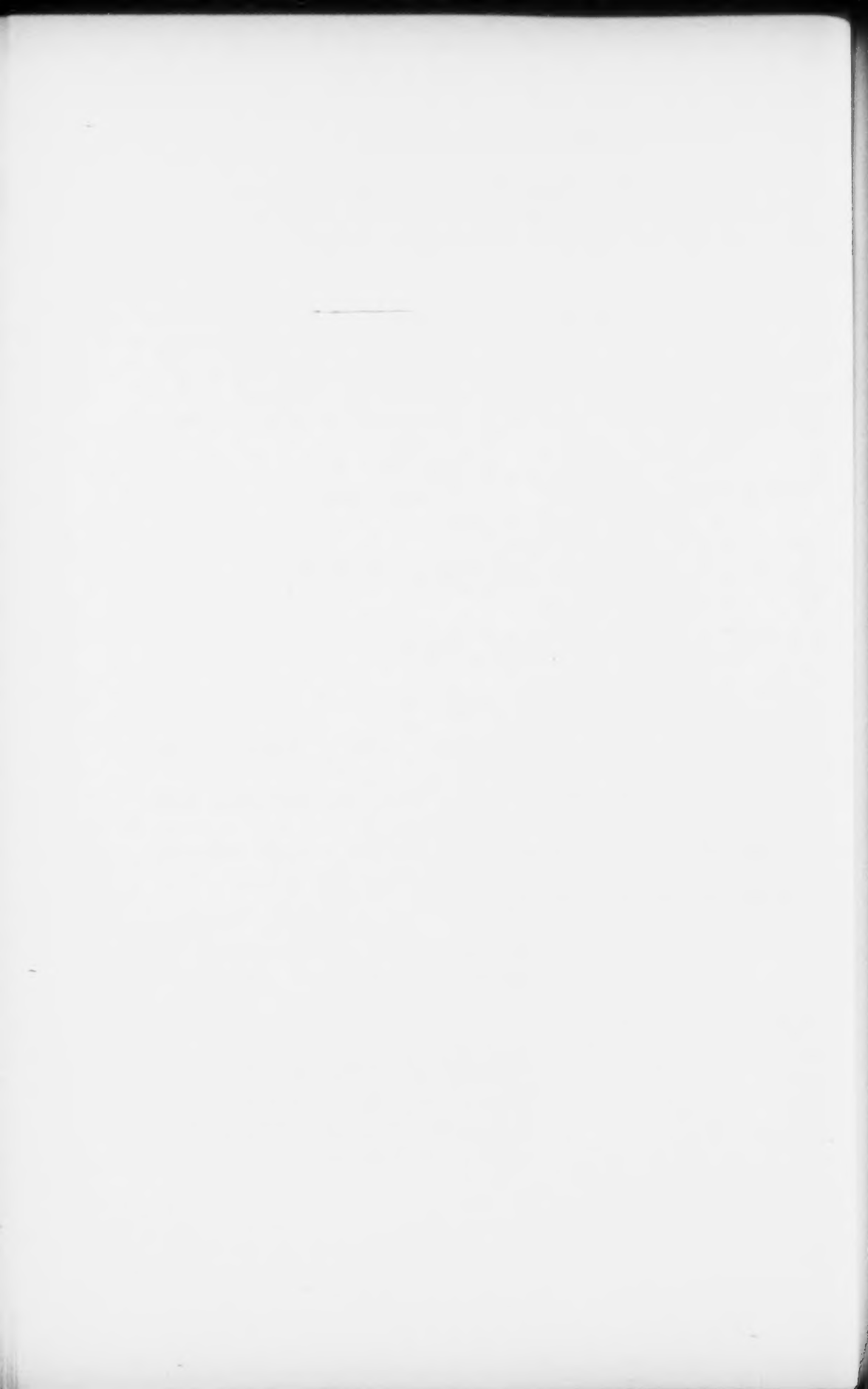
FIRST MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

NOW COMES the appellant, RITA IRIS FISHMAN, who requests the Court to reconsider the above case and to reverse the judgment and opinion which the court rendered herein on April 20, 1989.

Respectfully submitted by
Appellant's Attorney,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217



NO. 13-88-181-CR

IN THE THIRTEENTH COURT OF APPEALS
OF TEXAS

RITA IRIS FISHMAN,	§	ON APPEAL
Appellant	§	
	§	FROM CAMERON
VS. THE STATE OF TEXAS	§	COUNTY, TEXAS

APPELLANT'S FIRST AMENDED OR SECOND MOTION
FOR REHEARING AND FIRST MOTION TO ABATE
APPEAL FOR TRIAL COURT HEARING PURSUANT
To Tex.R.App.P. 53(m) and (j) SINCE TO
PROHIBIT APPELLANT FROM BEING DENIED A
MEANINGFUL APPEAL, UNDERSIGNED COUNSEL
ALONG WITH A RELATIVE OF APPELLANT WILL
NOW BUY THE \$9,000 STATEMENT OF FACTS
IF APPELLANT IS NOT JUDICIALLY
DECLARED LEGALLY ENTITLED TO
SUCH A FREE RECORD BECAUSE
OF HER FINANCIAL STATUS

TO THE COURT OF APPEALS FOR THE 13TH SUPREME
JUDICIAL DISTRICT:

Rita Iris Fishman, defendant in cause
no. 88-CR-87-E in the 357th District Court
of Cameron County, Texas before the
Honorable Rogelio Valdez, Judge Presiding,
and appellant before this Court of Appeals,
respectfully files in lieu of her first
motion for rehearing, this first amended or



second motion for rehearing, requesting this Court to reconsider and set aside its judgment and opinion of April 20, 1989, with instructions to the district court to grant the appellant's request so that at no expense to appellant the court reporter will furnish a statement of facts of the entire trial proceedings and the district clerk will furnish the transcript in this cause.

GROUND FOR REHEARING NUMBER ONE

The 13th Court of Appeals reversibly erred in overruling appellant's first point of error, since appellant's uncontroverted affidavit of indigency, which was judicially noticed after being offered in evidence, provided such evidence of appellant's financial status as to leave no discretion for the district court under Tex.R.App.P. 53(j)(2) but to find appellant to be adequately indigent for purposes of obtaining the requested appellate record of the jury trial.



GROUND FOR REHEARING NUMBER TWO

The 13th Court of Appeals reversibly erred in holding that the record did not support the appellant's contention that the district court failed to consider the documentary evidence which previously had been offered into evidence and judicially noticed at the appellant's request.

GROUND FOR REHEARING NUMBER THREE

The 13th Court of Appeals reversibly erred in holding that the fact that the appellant had secured bond and retained counsel should be considered in determining whether the appellant was indigent.

GROUND FOR REHEARING NUMBER FOUR

The 13th Court of Appeals reversibly erred in holding that the appellant had real property which could be either sold or encumbered to secure funds to pay for the statement of facts and transcript.



GROUND FOR REHEARING NUMBER FIVE

The Court of Appeals reversibly erred in failing to find that the district court improperly considered homestead property in deciding appellant personally had the ability to pay for the statements of facts on appeal.

GROUND FOR REHEARING NUMBER SIX

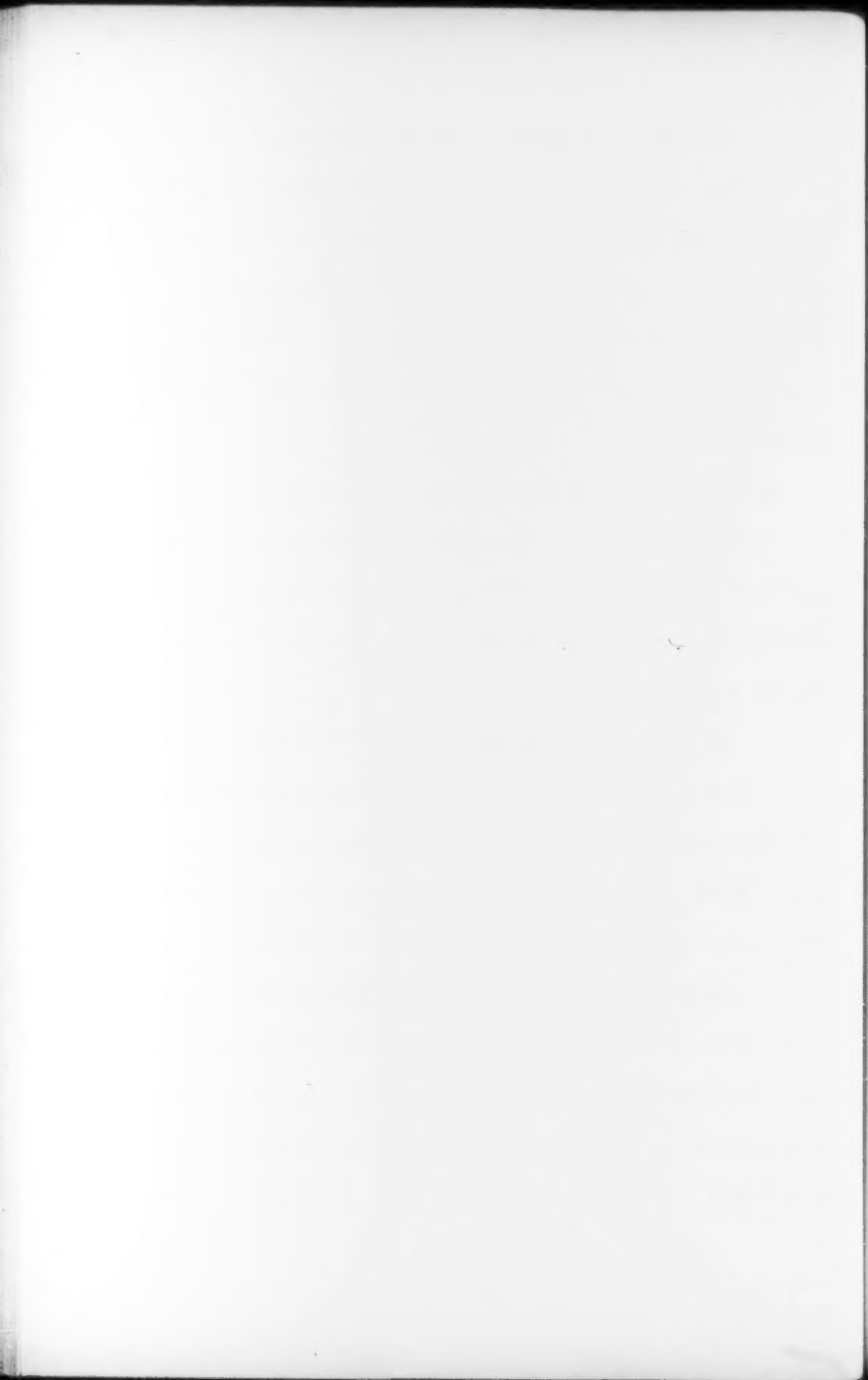
The Court of Appeals reversibly erred in failing to find that the district court did not apply the proper rule of law to the facts presented.

GROUND FOR REHEARING NUMBER SEVEN

The Court of Appeals reversibly erred in finding that on the facts of this case, appellant was required to introduce any evidence concerning her living expenses.

GROUND FOR REHEARING NUMBER EIGHT

The Court of Appeals reversibly erred in finding that on the facts of this case, appellant was required to introduce any evidence demonstrating why the 1.38 acre lot



could not legally be incumbered or sold in order to provide security or pay for the statement of facts and transcript.

GROUND FOR REHEARING NUMBER NINE

Contrary to the district court's implied negative finding concerning present ability to give security to obtain her own transcript (R. II-28), the 13th Court of Appeals reversibly erred in agreeing with the State's contention, which was untimely raised for the first time on appeal (see R. II-25-29), that appellant did not prove that she was unable to pay for a portion of the record, or alternatively provide security for a portion of the same.

GROUND FOR REHEARING NUMBER TEN

The judgment and opinion of the 13th Court of Appeals deprives appellant of her statutory right to a meaningful merits appeal of the conviction in this case, in violation of this appellant's right to due



course of law under Article I, Section 19 of the Texas Constitution.

GROUND FOR REHEARING NUMBER ELEVEN

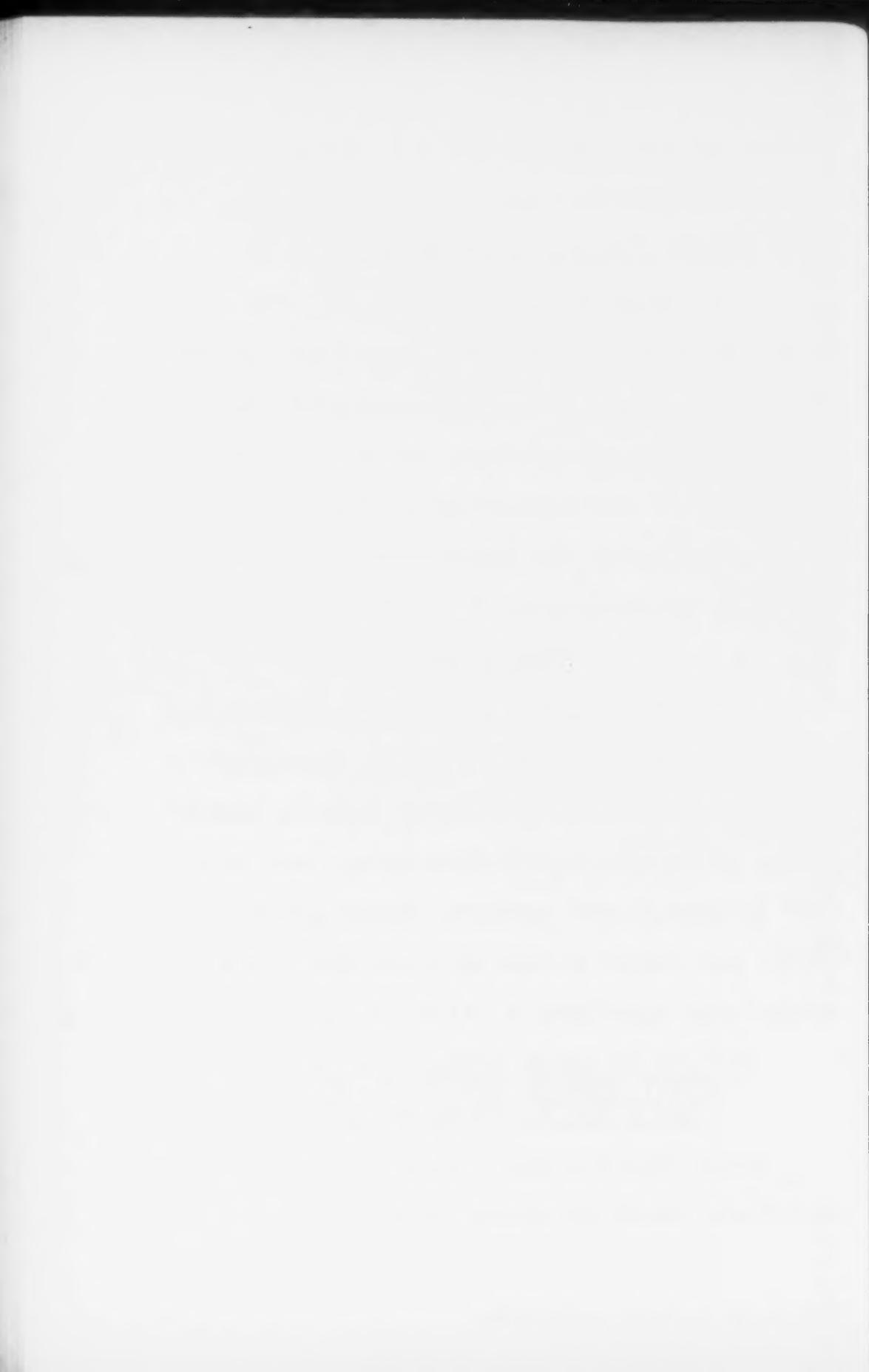
The judgment and opinion of the 13th Court of Appeals deprives appellant of her statutory right to a meaningful merits appeal of the conviction in this case, in violation of this appellant's right to equal protection under the Fourteenth Amendment to the U.S. Constitution. * * * * *

CONCLUSION

For the reasons stated above and for the reasons contained in the appellant's original brief, this Court of Appeals should grant this Motion for Rehearing, set aside its judgment and opinion dated April 20, 1989, and enter a new opinion and judgment sustaining appellant's rehearing grounds.

MOTION TO ABATE APPEAL FOR TRIAL
COURT HEARING NOW PURSUANT TO
Tex.R.App.P. 53(m) and (j)

Rita Iris Fishman, appellant moves the appellate court to abate this appeal and to

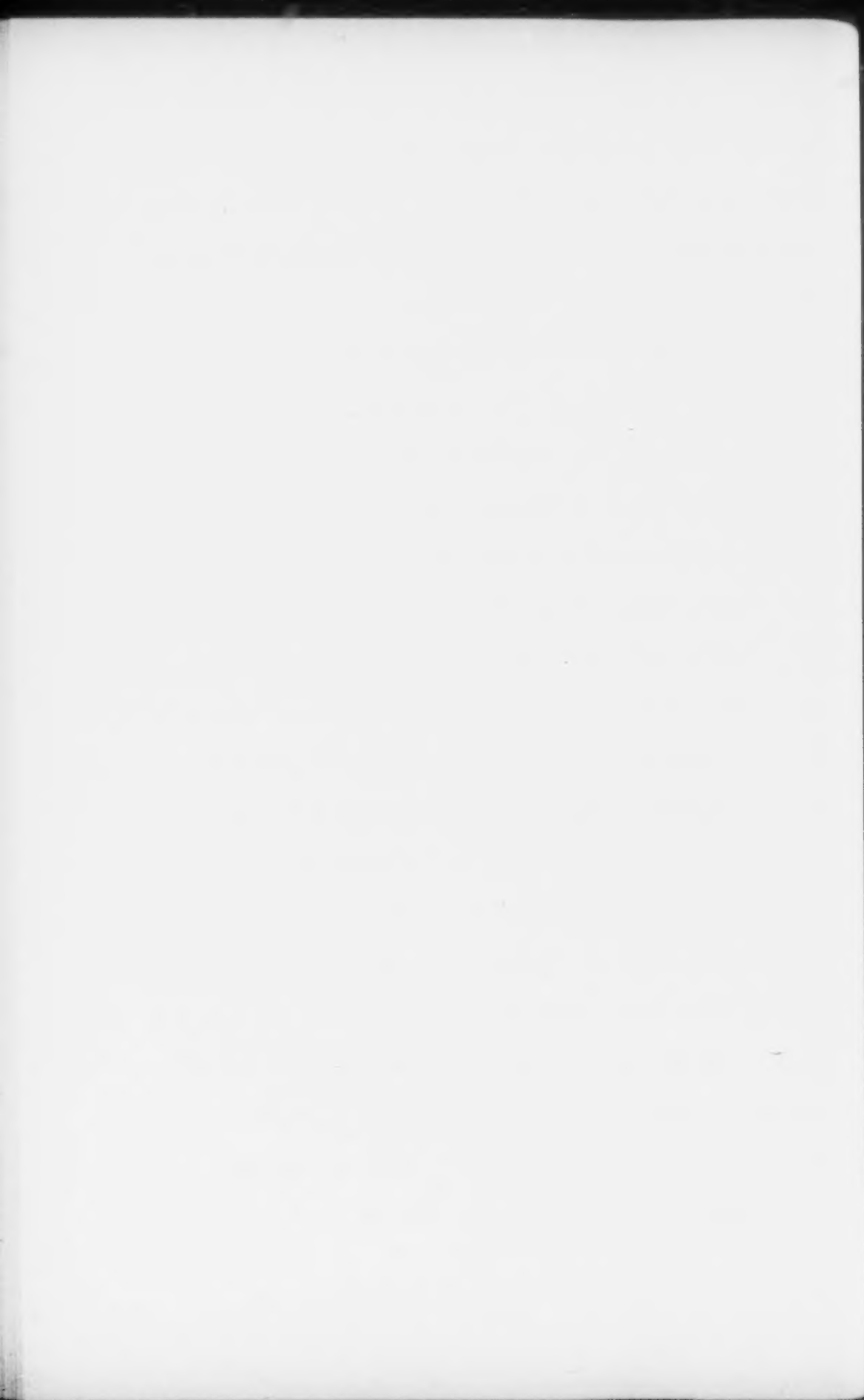


order the district court to hold a hearing pursuant to Texas R.App.P. 53(m) and (j) to determine at the present time (nearly a year since the August 4, 1988),

- A. whether this appellant has now been deprived of a statement of facts because of ineffective counsel or for any other reason; and/or
- B. whether this appellant is now unable to pay for or give security for all or part of the court reporter's statement of facts and the district clerk's transcript.

ACKNOWLEDGEMENT BY ATTORNEY CONNORS

Attorney Joseph A. Connors III is having ethical pangs of conscience. Connors has been paid to prepare a merits appellate brief but has not been provided a record with which to prepare appellant's merits appeal. During oral argument in this case, presiding judge Utter inquired in effect if attorney Connors were willing to buy the



appellate record. Now after receiving the 13th Court's opinion dated April 20, 1989, attorney Connors has determined that if the district court legally denied such merits record to appellant, then appellant must have one even if it means attorney Connors will have to sacrifice part of his appellate attorney's fees. On May 17, 1989 about 5:30 p.m. CST, attorney Connors spoke by phone to appellant's uncle in New York. That uncle said he will obtain the money to now buy the appellate record if the appellate court's opinion remains unchanged. Thus attorney Connors requests the 13th Court to consider the foregoing first amended or second motion for rehearing. If the district court's judgment is still to be affirmed, attorney Connors on behalf of appellant requests time from the 13th Court so the court reporter can be paid the \$9,000.00 by attorney Connors and appellant's New York uncle (two persons not legally obligated to so act) so



that now at this late date, appellant can properly and fully exercise her statutory right to appellate review of the merits of her jury trial.

Respectfully submitted by
Appellant's Attorneys,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217

THOMAS SULLIVAN
Texas Bar No. 19491800
1185 F.M. 802, Suite 4
Brownsville, Texas 78521
(512) 544-4500

WILLIAM E. OWEN
OF COUNSEL
Texas Bar No. 15375150
221 N. 8th Street
Edinburg, Texas 78539
(512) 381-6222



THE STATE OF TEXAS §

COUNTY OF HIDALGO §

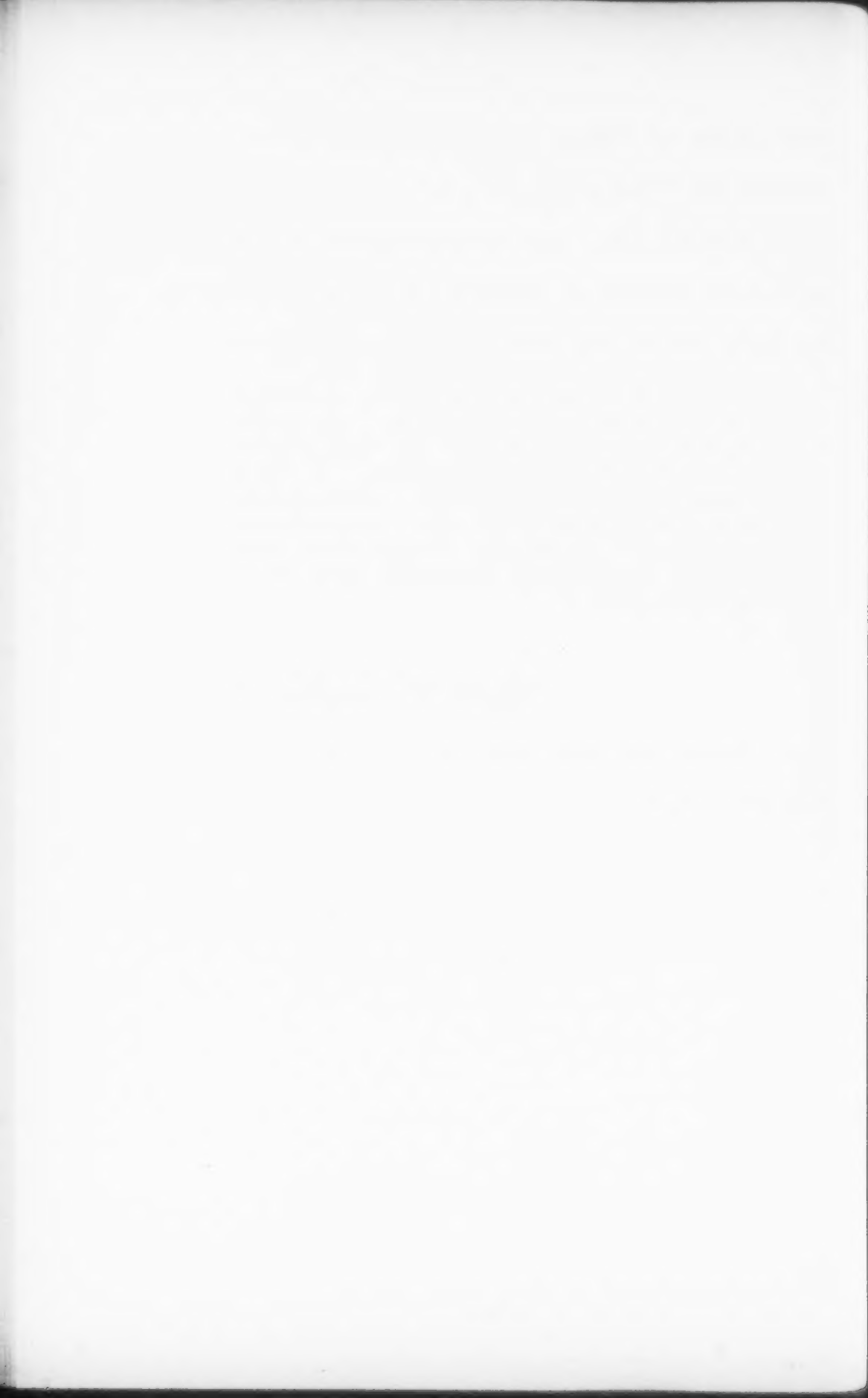
BEFORE ME, the undersigned authority,
appeared JOSEPH A. CONNORS III, who being by
me duly sworn did say:

"My name is Joseph A. Connors
III, and I am one of the
appellant's counsel in the above
styled and numbered cause. I have
read all of the foregoing
Acknowledgement by attorney
Connors. I hereby swear that the
facts contained therein are true
and correct."

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III

SWORN TO AND SUBSCRIBED before me on
May 18, 1989.

/s/ Rosalba Garza
Notary Public In And For
The State of Texas



Court of Appeals
Thirteenth Supreme Judicial District
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

June 8, 1989

Thomas Sullivan
Downey & Sullivan
Attorneys at Law
1185 FM 802, Suite 4
Brownsville, Texas 78521

Joseph A. Connors, III
Attorney at Law
P.O. Box 5838
McAllen, Texas 78502

Mr. William E. Owen
Attorney at Law
221 N. 8th Street
Edinburg, Texas 78539

Ben Euresti, Jr.
County Criminal District Attorney
974 E. Harrison
Brownsville, Texas 78520

RE: CASE NO. 13-88-00181-CR
TRIAL COURT CAUSE NO. 88-CR-87-E

STYLE: Fishman Rita Iris
V: The State of Texas

The appellant's motion for addition of co-counsel was GRANTED by this Court on this date, and the Honorable William E. Owen has been added as co-counsel for appellant in this cause.



The appellant's motion for leave to file amended motion for rehearing was also GRANTED by this Court on this date. The amended motion for rehearing has been ordered filed as of May 19, 1989, the date of receipt. The appellant's amended motion for rehearing was OVERRULED by this Court on this date. The appellant's motion to abate was DISMISSED by this Court on this date.

Respectfully yours,

BETH A. GRAY, Clerk

By /s/ Cathy Wilborn
Deputy



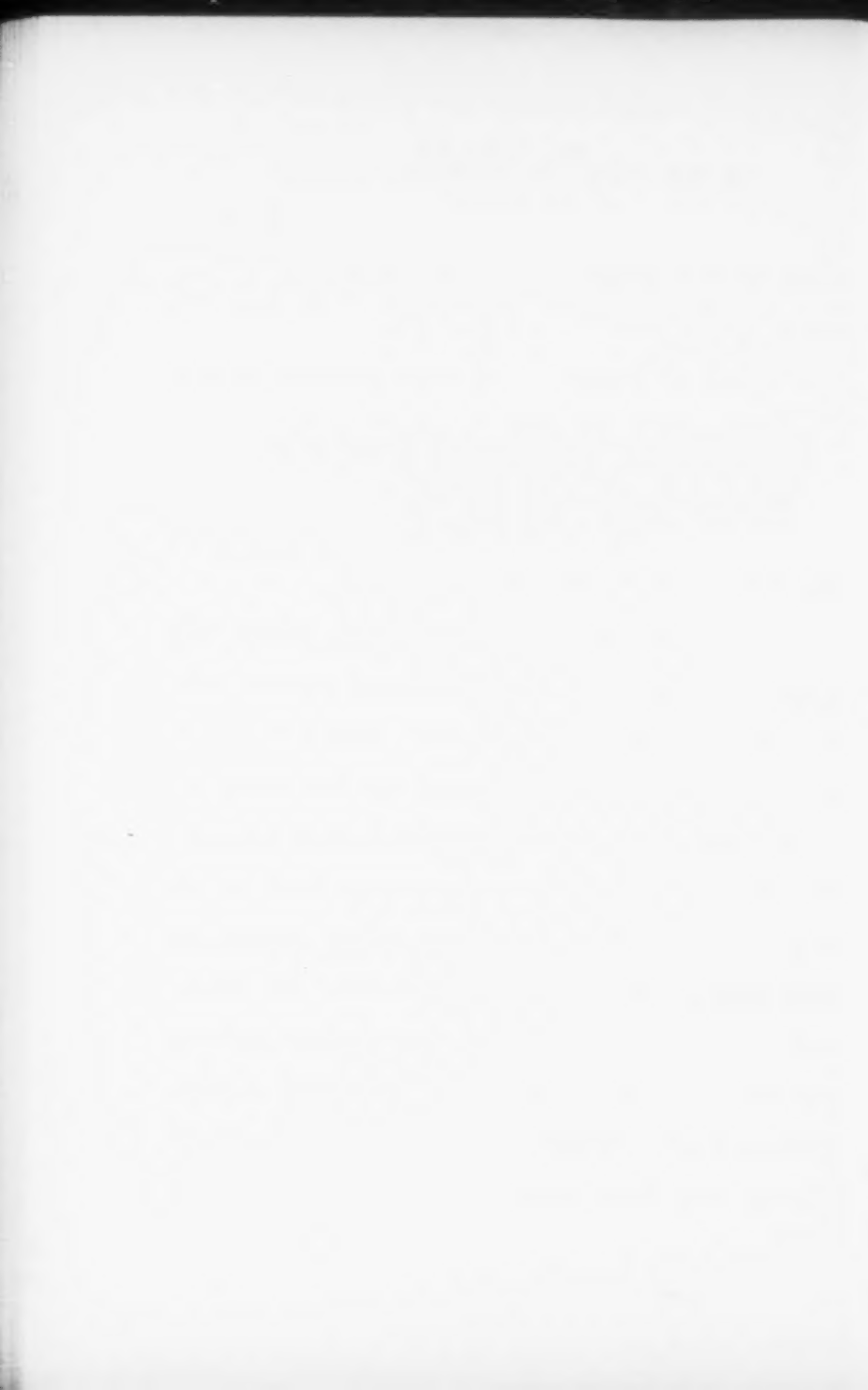
No. 1085-89
IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

RITA IRIS FISHMAN § ON APPEAL
 §
VS. §
 §
THE STATE OF TEXAS § FROM CAMERON COUNTY

APPELLANT'S MOTIONS TO ABATE APPEAL AND
TO SUPPLEMENT INFORMATION CONCERNING BOTH
HER P.D.R. AND HER CURRENT EXPENSES AND
CHANGED CONDITIONS NOW THAT ALL INCOME
HAS BEEN TERMINATED

TO THE COURT OF CRIMINAL APPEALS:

RITA IRIS FISHMAN, appellant moves the
court to abate the direct appeal process and
to remand the cause to the district court
for another hearing pursuant to Tex.R.App.P.
53(m) and (j) since conditions have changed
so greatly since the evidentiary hearing on
August 8, 1988. Appellant also moves to
supplement the information before the court
concerning her petition for discretionary
review (P.D.R.) and her current living
expenses and changed conditions now that all
income has been terminated and her current



living expenses are being paid by securing loans. In support of these motions, appellant has attached her affidavit dated September 12, 1989. Said affidavit is incorporated herein for all purposes.

ARGUMENT

The last hearing on this matter was conducted in the district court on August 4, 1988 and appellant's financial circumstances have greatly deteriorated since then.

Respectfully submitted by
Appellant's Attorneys,

/s/ Joseph A. Connors III
JOSEPH A. CONNORS III
Texas Bar No. 04705400
McAllen, Texas 78502-5838
(512) 687-8217

THOMAS SULLIVAN
Texas Bar No. 10491800
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(512) 544-4500

WILLIAM E. OWEN
Texas Bar No. 15375150
221 N. 8th Street
Edinburg, Texas 78539
(512) 381-6222



CAUSE NO. 1085-89
IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

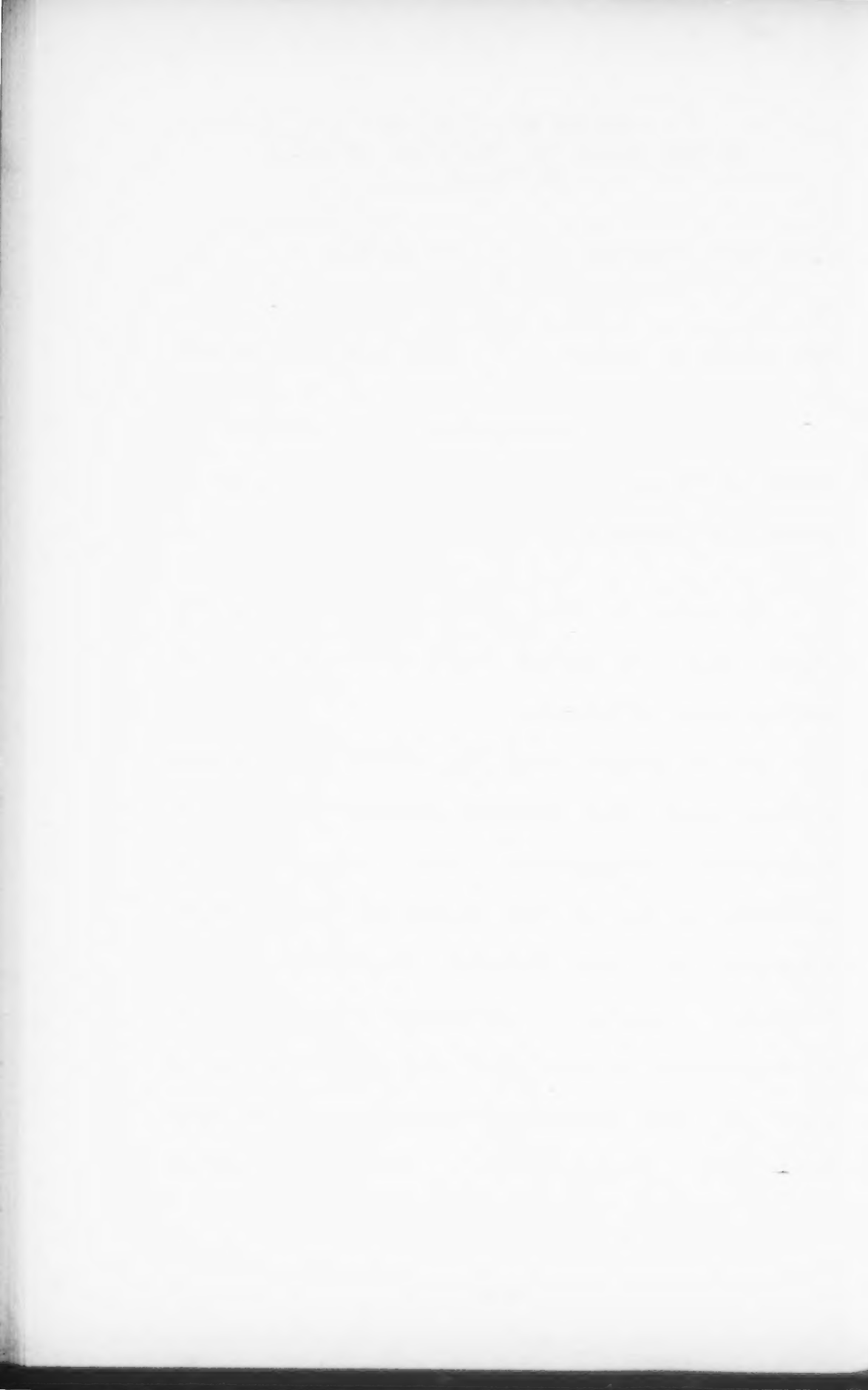
RITA IRIS FISHMAN * ON APPEAL
 *
VS. *
 *
THE STATE OF TEXAS * FROM CAMERON COUNTY

AFFIDAVIT

STATE OF TEXAS
COUNTY OF CAMERON

My name is Rita Iris Fishman, I am 41 years old, of sound mind and capable of making this affidavit.

On or about July 10, 1989, I received notice that the United States Office of Personnel Management had stopped all payments to me as the widow of Sam Fishman pursuant to the Federal Employees Civil Service Annuity. Attached hereto and Incorporated herein for all purposes is a copy of the notice I received from the financial institution, Valley Federal



Employees Credit Union, where the annuity was directly deposited.

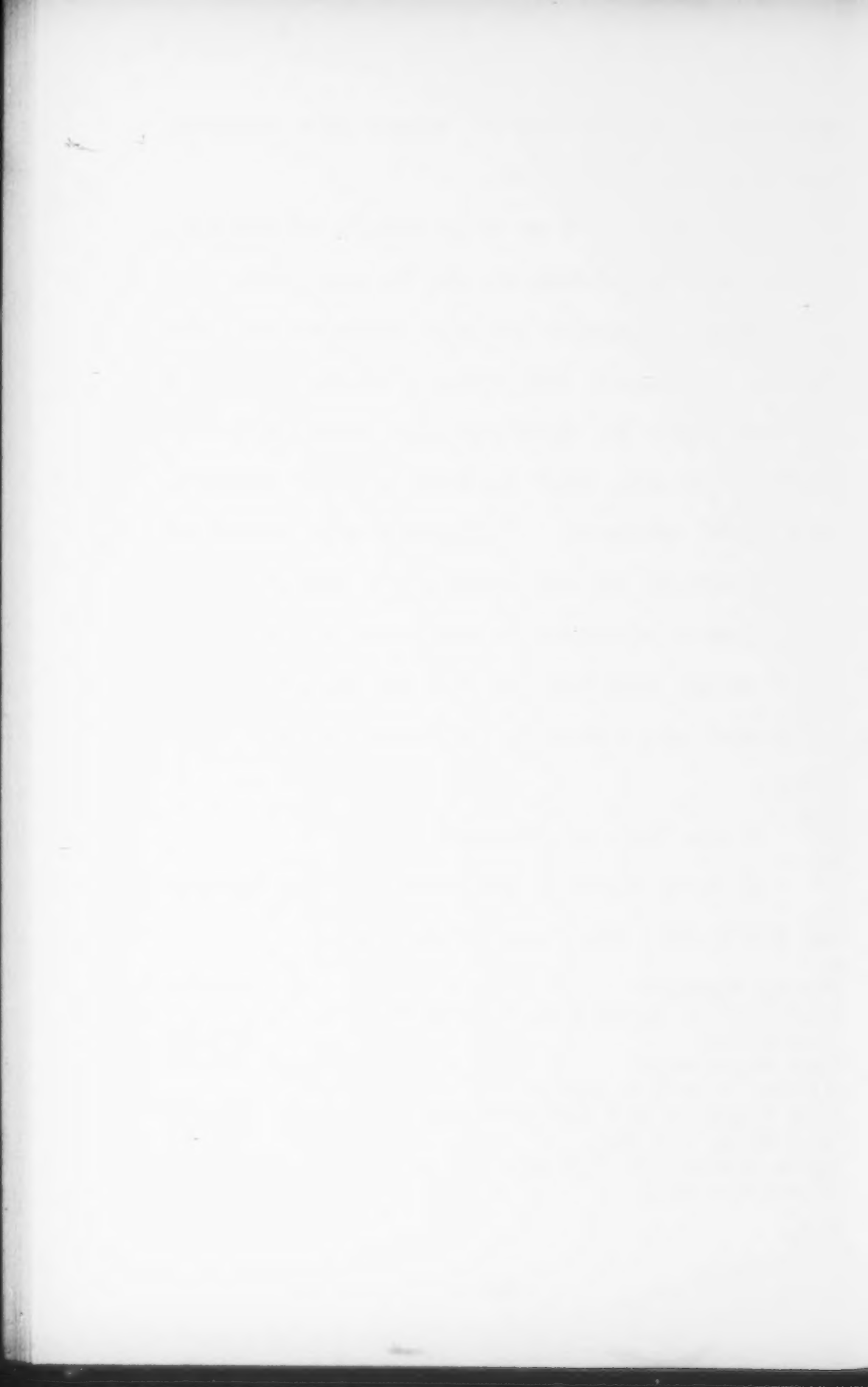
This has been my only source of income. I now have no income at all in any form.

When I contacted the manager of the Valley Federal Employees Union, I was advised that my daughter was also declared ineligible and that payment of her annuity was also stopped. I immediately notified the Guardian of my daughter's estate, the Hon. James Odabashian, Attorney at law. To this date, neither he nor my daughter has received any annuity payment since May, 1989.

I now have no income.

I have monthly expenses in the amount of \$1374.73. They are as follows:

House Payment	\$ 542.00
(including insurance and taxes)	
Groceries	250.00
Car Insurance	39.00
(\$234. every 6 mos.)	
Car repairs and maintenance	100.00
Clothing for Amy	80.00
Life insurance for Amy	8.73
Electric Bill	150.00



Telephone	20.00
Water	13.00
Medical and Dental bills for Amy	20.00
Health Insurance	102.00
Home Repair	50.00

Since the annuity has not been paid, I have been borrowing money from my parents to live.

I have been looking for employment but I still have not been able to find one. I go to the Texas Employment Commission once a week to check on jobs. I have no marketable skills, and have not worked outside the home since before I was married in 1975. Most minimum wage jobs for which I may be qualified, require the applicant to be bilingual and I am not. I have also discovered employers are reluctant to hire me because of all my legal problems. My job search is further complicated by my lack of day care for my daughter.

Date 9/12/89

/s/ Rita Iris Fishman
Rita Iris Fishman



ACKNOWLEDGEMENT

THE STATE OF TEXAS :

COUNTY OF CAMERON :

BEFORE ME, a Notary Public, on this day personally appeared RITA IRIS FISHMAN, known to me to be the person whose name is subscribed to the foregoing instrument

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 12th day of September, 1989.

/s/ Rosalinda A. Sullivan
Notary Public in and for
Cameron County, Texas

My commission expires: 5-18-92



U.S. OPM WESTERN UNION MAILGRAM
1900 E STREET NW
WASHINGTON, DC 20415 30AM

U.S. OPM WESTERN UNION MAILGRAM
1900 E STREET NW
WASHINGTON, DC 20415 30AM

1-025201U150008 05/30/89 ICS WA16614
00418 MLTN VA 05/30/89 JN29933

VALLEY FED EMPL FCU
PO BX 3862
BROWNSVILLE TX 78520

PLEASE RETURN NEXT TREASURY DIRECT DEPOSIT
PAYMENT RECEIVED FOR THIS ACCOUNT:

CO NAME: US TREASURY 307

CO ID: 3071036184

CO DATE: FIRST BUSINESS DAY OF JUNE

ACCOUNT NUMBER: C3362-14-01

PAYEE: RITA IRIS FISHMAN

AMOUNT: 521.00

OPM CLAIM NUMBER: CS F1369986W

REASON: INELIGIBLE

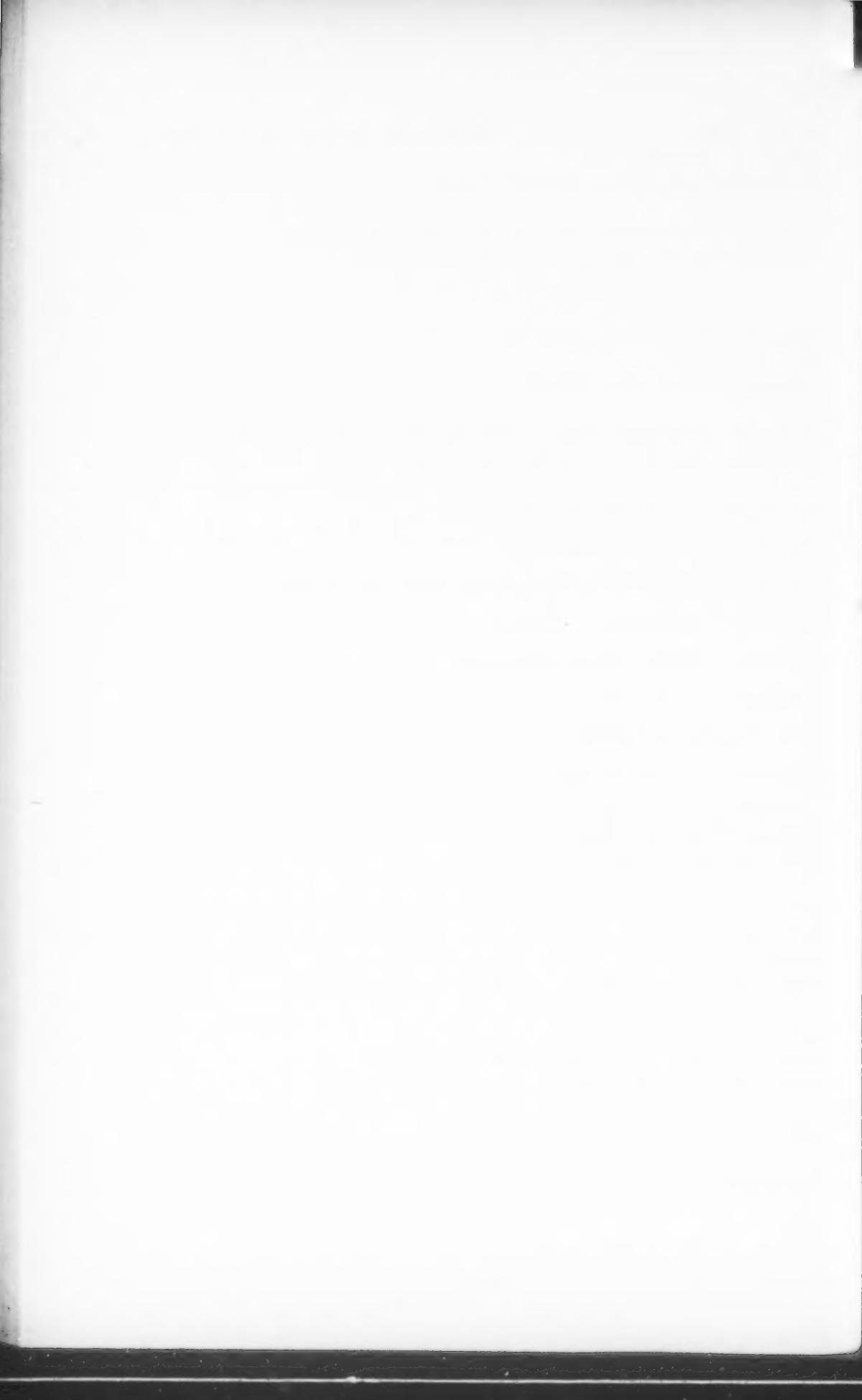
IMPORTANT: DO NOT RETURN PAYMENT BY
CHECK-USE RETURN ITEM OR TAPE.
SEE GREEN BOOK.

DELAY WILL RESULT IN ISSUANCE OF RECLAMATION NOTICE. IF NOTICE IS RECEIVED FOR THIS PAYMENT AFTER REPAYING, INDICATE PREVIOUS REPAYMENT AND REMIT ONLY BALANCE DUE.

ACCOUNTING BRANCH
RETIREMENT AND INSURANCE GROUP
OFFICE OF PERSONNEL MANAGEMENT

10:20 EST

MGMCOMP



No. 1085-89

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

RITA IRIS FISHMAN	§ ON APPEAL
	§
VS.	§
	§
THE STATE OF TEXAS	§ FROM CAMERON COUNTY

APPELLANT'S PETITION FOR DISCRETIONARY
REVIEW OF THE JUDGMENT, OPINION AND
RULINGS IN CAUSE NO. 13-88-181-CR

[Note: In that P.D.R., the appellant's
nineteen grounds of error read
as follows: see next page]



GROUND FOR REVIEW NO. 1

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number five, which read:

The Court of Appeals reversibly erred in failing to find that the district court improperly considered homestead property in deciding appellant personally had the ability to pay for the statements of facts on appeal.

GROUND FOR REVIEW NO. 2

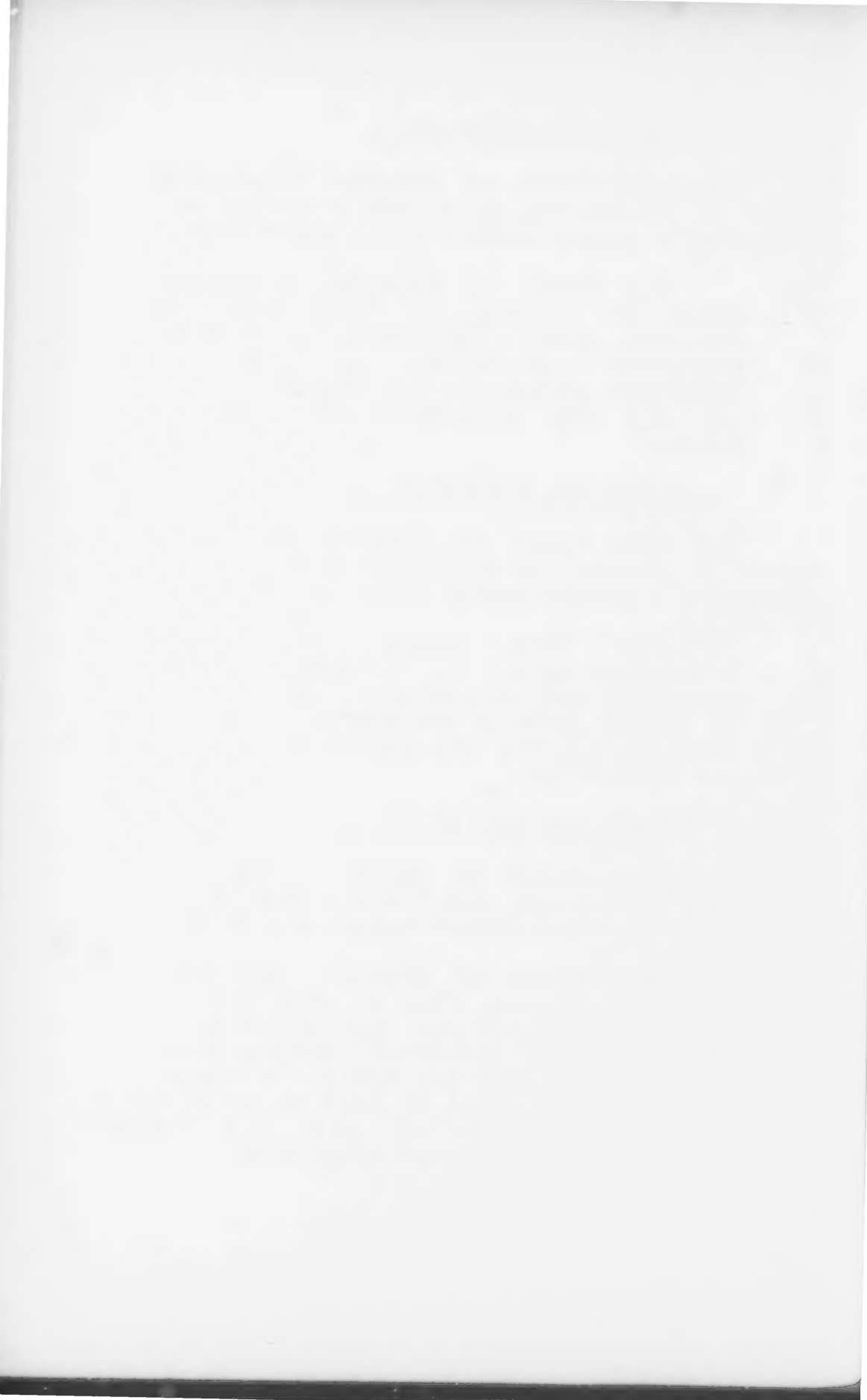
The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number four, which read:

The 13th Court of Appeals reversibly erred in holding that the appellant had real property which could be either sold or encumbered to secure funds to pay for the statement of facts and transcript.

GROUND FOR REVIEW NO. 3

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number eight, which read:

The Court of Appeals reversibly erred in finding that on the facts of this case, appellant was required to introduce any evidence demonstrating why the 1.38 acre lot could not legally be incumbered (sic) or sold in order to provide security or pay for the statement of facts and transcript.



GROUND FOR REVIEW NO. 4

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number one, which read:

The 13th Court of Appeals reversibly erred in overruling appellant's first point of error, since appellant's uncontroverted affidavit of indigency, which was judicially noticed after being offered in evidence, provided such evidence of appellant's financial status as to leave no discretion for the district court under Tex.R.App.P. 53(j)(2) but to find appellant to be adequately indigent for purposes of obtaining the requested appellate record of the jury trial.

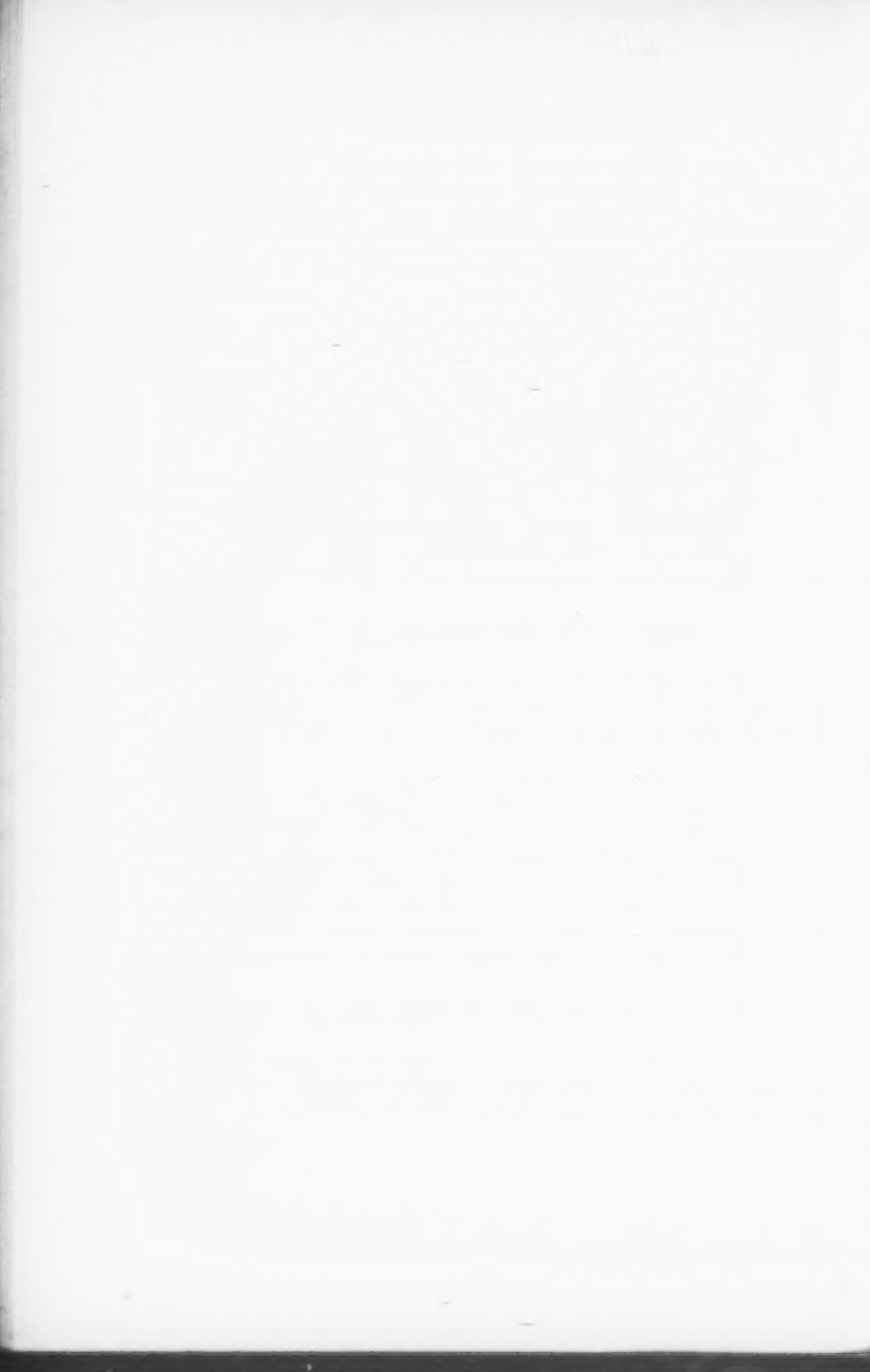
GROUND FOR REVIEW NO. 5

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number two, which read:

The 13th Court of Appeals reversibly erred in holding that the record did not support the appellant's contention that the district court failed to consider the documentary evidence which previously had been offered into evidence and judicially noticed at the appellant's request.

GROUND FOR REVIEW NO. 6

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. two, which read:



In determining the question of appellant's indigence the district court abused its discretion in limiting its consideration to only oral "evidence that I have heard" (R. II-28), since the court failed to consider the documentary evidence (R. SI-10, 20-49; SSI 2-3), which previously had been offered into evidence and judicially noticed (received in evidence) at appellant's request (R. II-2-4).

GROUND FOR REVIEW NO. 7

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number six, which read:

The Court of Appeals reversibly erred in failing to find that the district court did not apply the proper rule of law to the facts presented.

GROUND FOR REVIEW NO. 8

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. three, which read:

On August 4, 1988, the district court abused its discretion in finding that appellant "is not indigent" (R. II-28, lines 17-18; SI-65).

GROUND FOR REVIEW NO. 9

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. four, which read:



The district court abused its discretion in finding that appellant has at her disposal sufficient sums of money to obtain her own transcript (R. II-28, lines 18-20).

GROUND FOR REVIEW NO. 10

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number seven, which read:

The Court of Appeals reversibly erred in finding that on the facts of this case, appellant was required to introduce any evidence concerning her living expenses.

GROUND FOR REVIEW NO. 11

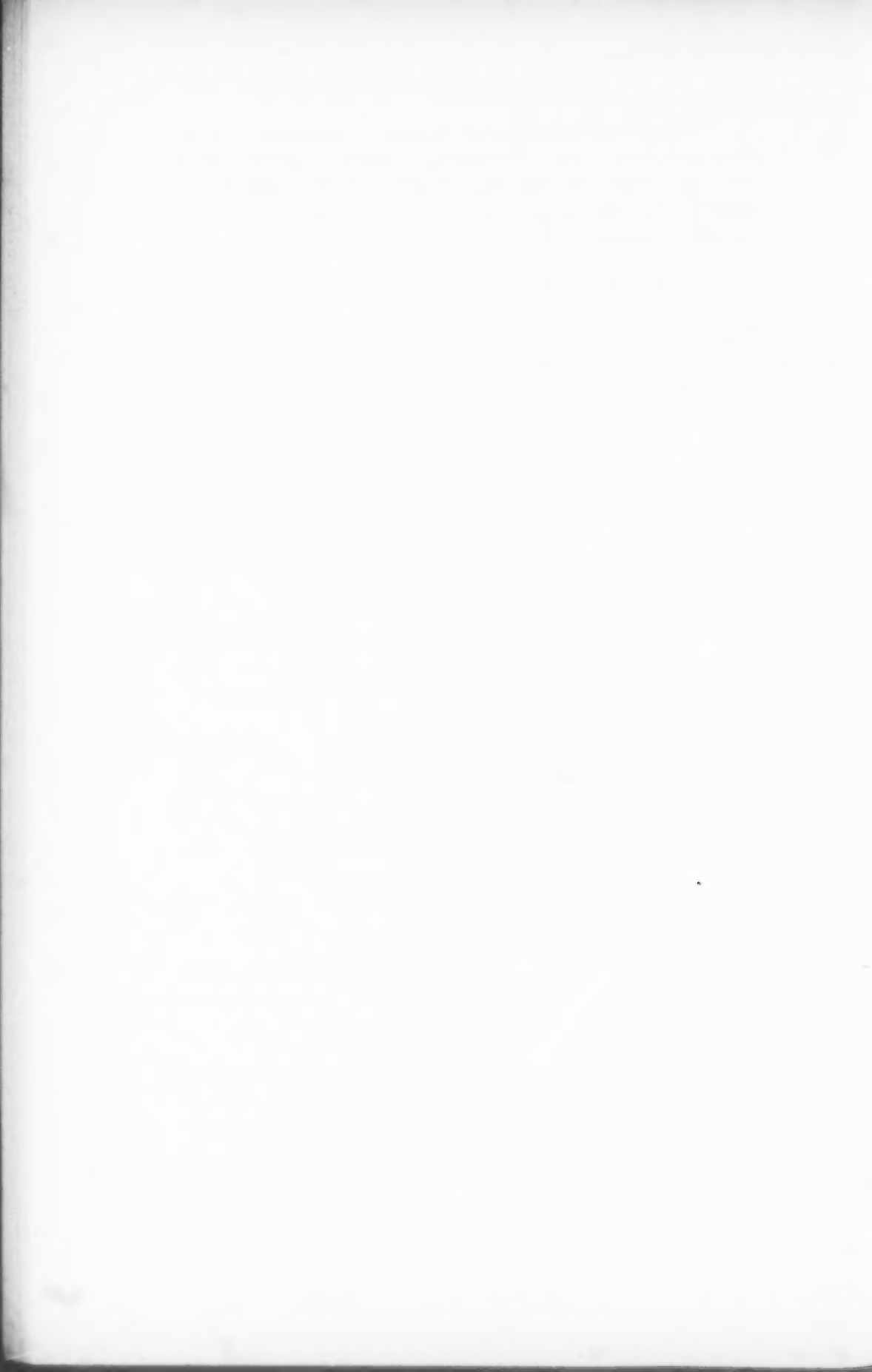
The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number three, which read:

The 13th Court of Appeals reversibly erred in holding that the fact that the appellant had secured bond and retained counsel should be considered in determining whether the appellant was indigent.

GROUND FOR REVIEW NO. 12

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. five, which read:

In determining the question of appellant's indigence for purposes of obtaining a record on appeal, the district court abused its discretion in considering as relevant factors that appellant not only had retained counsel



at the prior (motion for new trial) hearing but also is now being represented by attorneys Joseph Connors and Thomas Sullivan on August 4, 1988, (R. II-28-29, line 22 to line 3).

GROUND FOR REVIEW NO. 13

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. six, which read:

The prosecutor committed constitutional misconduct in opposing this indigent appellant's prima facie case with nothing but lawyer talk (R. II-23-29).

GROUND FOR REVIEW NO. 14

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing ground no. nine, which read:

Contrary to the district court's implied negative finding concerning present ability to give security to obtain her own transcript (R. II-28), the 13th Court of Appeals reversibly erred in agreeing with the State's contention, which was untimely raised for the first time on appeal (see R. II-25-29), that appellant did not prove that she was unable to pay for a portion of the record, or alternatively provide security for a portion of the same.

GROUND FOR REVIEW NO. 15

On August 31, 1988, the 13th Court of Appeals reversibly erred in denying appellant's 1988 motion to abate appeal.



GROUND FOR REVIEW NO. 16

On June 8, 1989, the 13th Court of Appeals reversibly erred in dismissing appellant's 1989 MOTION TO ABATE APPEAL FOR TRIAL COURT HEARING PURSUANT TO Tex.R.App.P. 53(m) and (j) SINCE TO PROHIBIT APPELLANT FROM BEING DENIED A MEANINGFUL APPEAL, UNDERSIGNED COUNSEL ALONG WITH A RELATIVE OF APPELLANT WILL NOW BUY THE \$9,000 STATEMENT OF FACTS IF APPELLANT IS NOT JUDICIALLY DECLARED LEGALLY ENTITLED TO SUCH A FREE RECORD BECAUSE OF HER FINANCIAL STATUS.

GROUND FOR REVIEW NO. 17

The 13th Court of Appeals reversibly erred in overruling appellant's brief's point of error no. eight, which read:

The district court violated appellant's rights not only to open access to the appellate courts guaranteed her under Section 13 of Article I of the Texas Constitution (R. II-28; SI-65).

GROUND FOR REVIEW NO. 18

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number ten, which read:

The judgment and opinion of the 13th Court of Appeals deprives appellant of her statutory right to a meaningful merits appeal of the conviction in this case, in violation of this appellant's right to due course of law under Article I, Section 19 of the Texas Constitution.



GROUND FOR REVIEW NO. 19

The 13th Court of Appeals reversibly erred in overruling appellant's motion for rehearing's ground number eleven, which read:

The judgment and opinion of the 13th Court of Appeals deprives appellant of her statutory right to a meaningful merits appeal of the conviction in this case, in violation of this appellant's right to equal protection under the Fourteenth Amendment to the U.S. Constitution.

No. 1085-89

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

RITA IRIS FISHMAN	§ ON APPEAL
	§
VS.	§
	§
THE STATE OF TEXAS	§ FROM CAMERON COUNTY

REHEARING MOTION

TO THE COURT OF CRIMINAL APPEALS:

RITA IRIS FISHMAN, appellant moves for rehearing of the Court's order refusing to grant appellant's petition for discretionary review (p.d.r.) in the above cause for the following reasons.

FACTS

Offered into evidence and judicially noticed (received in evidence) at appellant's request (R. II-2-4) was her affidavit of indigency and her request therein for a free record on appeal. With that affidavit in evidence, appellant believes she proved her financial status for



purposes of obtaining a free record under applicable federal and state law. See Tex.R.App. 53(j)(2). That affidavit read (R. SI-10):

BEFORE ME, the undersigned authority, personally appeared the above Defendant, who being by me duly sworn on oath said:

"My name is RITA IRIS FISHMAN and I am the Defendant in the above styled and numbered cause. On April 21, 1988, the judgment and imposition of sentence was entered against me in this cause. I have given Notice of Appeal to the Court of Appeals for the Thirteenth Supreme Judicial District of Texas, sitting in Corpus Christi, Texas. Other than my personal possessions and several other assets, having a total value of much less than \$9,000, and my undivided interest in one-half of our residence. I am indigent and live on a very limited income. After normal living expenses are provided for, I have insufficient money, property or assets of any kind available to pay for or give security in order to pay for the Statement of Facts or Transcript in this cause. I have been informed that the trial court reporter estimates that she will need \$9,000 to pay the expense of preparing the statement of facts in the above case. I am unable to



pay the reporter that \$9,000. I hereby request that the Court order the court reporter to furnish a Statement of Facts of the entire trial proceedings at no expense to me and to further order the Clerk to furnish the Transcript in this cause at no expense to me."

/s/ Rita Iris Fishman
AFFIANT

SWORN TO AND SUBSCRIBED
before me, this the 23rd day of
June, 1988.

/s/ Emma Garcia
Notary Public In and For
The State of Texas

Based on that affidavit, appellant unequivocally proved in the district court that appellant lives on such a very limited income and is indigent other than her personal possessions and several other assets, having a total value of much less than \$9,000.00, and her undivided interest in one-half of her residence, and after normal living expenses are provided for, she has insufficient money, property or assets

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY
530 SOUTH EAST ASIAN AVENUE
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of any kind available to pay for or give security in order to pay for the Statement of Facts and Transcript in this cause. There was no evidence before the district court to discredit any of those affidavit facts. If, as and when the State discovers any false representations in appellant's affidavit, the State's remedy is not a finding of non-indigency but a perjury indictment. Of course a residence sets on land, whether the land be composed of one or more urban lots, it can still be, and is herein, homestead.

VERIFIED WEIRD FACTS NOT OF RECORD

No where in the record is there evidence that appellant personally paid the cost of her pre-trial or appeal bail bonds or the cost of attorneys' fees for trial or appellate work. In fact appellant personally received financial gifts and loans from family and relatives to be able

to afford and to pay all those bail and attorneys' expenses.

Nevertheless, the 13th court of appeals said (Slip Opinion at 6):

— In the case now before us, we cannot find that the trial court abused its discretion in failing to find that appellant could not pay for or give security for a \$9,000 statement of facts. Appellant did not introduce any evidence concerning her living expenses. Although there was evidence that appellant had been unemployed, the record reflects that appellant was able to secure bond and retain counsel.

FIRST REHEARING GROUND

While all Texas residents have statutory and constitutional homestead rights to keep creditors from forcing the sale of the debtor's urban homestead, appellant was unlawfully denied those homestead rights in the 13th court of appeals' opinion and resulting judgment in violation of appellant's right to equal protection under the Fourteenth Amendment to the U.S. Constitution.



SECOND REHEARING GROUND

Appellant was denied the due process guaranteed by the Fourteenth Amendment to the U.S. Constitution, when the 13th court of appeals in its opinion abandoned the district court's theory for rejecting appellant's indigency since appellant had funds to pay for the appellate record, because that district court's incorrect theory was disproved by appellant in the record and appellant's brief.

THIRD REHEARING GROUND

The 13th court of appeals reversibly erred in agreeing (Slip Opinion at 2) with the State's argument that appellant did not prove that she was unable to pay for all or a portion of the record or, alternatively provide security for all or a portion of the same.

FOURTH REHEARING GROUND

The 13th court of appeals reversibly erred in agreeing (Slip Opinion at 2) with



the State's contention that the record does not affirmatively show that the trial court abused its discretion in finding that appellant was not indigent.

FIFTH REHEARING GROUND

In violation of appellant's rights guaranteed by the ex post facto clause of the Federal Constitution's Article 1, § 9, cl. 3 and § 10, cl. 1, the 13th court of appeals reversibly erred in affirming the trial court's judgment on new legal requisites a Texas convicted criminal must satisfy before being legally entitled to obtain the appellate record at no personal cost so that this cause's unemployed appellant would be able to exercise her statutory right to obtain appellate review of the judgment of conviction entered against her by the trial court.

SIXTH REHEARING GROUND

On September 26, 1989, the Court of Criminal Appeals reversibly erred in denying



appellant's September 1989 motion to abate appeal and to remand the cause to the district court, since conditions have so changed while this cause was on appeal.

SEVENTH REHEARING GROUND

On September 26, 1989, the Court of Criminal Appeals reversibly erred in denying appellant's September 1989 motion to supplement information concerning both appellant's p.d.r. and her current expenses and changed conditions now that there has been a cessation of all income (government benefits) to support appellant and her child.

[The remainder of this motion is omitted here].

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

November 29, 1989

COA#: 13-88-00181-CR

RE: Case No. 1085-89

STYLE: Fishman, Rita. Iris

On this day the Appellant's Motion for Rehearing was denied.

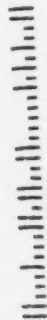
JUDGES CLINTON & TEAGUE WOULD GRANT ON NO. 1.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Joseph A. Connors III
P. O. Box 5838
McAllen, TX 78502

MAIL TO:







OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 1085-89
STYLE: Fishman, Rita Iris

ON THIS DAY THE APPELLANT'S MOTION FOR REHEARING WAS
RECEIVED AND FILED WITH THIS COURT.

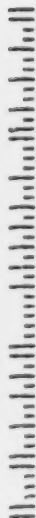


Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:

Joseph A. Connors III
P. O. Box 5838
McAllen, TX 78502







OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 1085-89
STYLE: Fishman, Rita Iris

On this day, the Appellant's Petition for Discretionary
Review has been REFUSED.

October 25, 1989

COA# 13-88-00181-CR

AUSTIN

OCT 25 89

PETITION FOR DISCRETIONARY

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:

Joseph A. Connors III
P. O. Box 5838
McAllen, TX 78502



OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS



OFFICIAL NOTICE
RE: Case No. 1085-89
STATE vs. Fishman, Rita Iris

AUSTIN COA# 135-88-00181-CR
SEP 26 '89
September 26, 1989

On this day the Appellant's Motion to Abate and to Supplement the Record has been denied.

CLIENT'S COPY

mailed to Myron Vinson, Rita plus
Fishman, and Mr. & Mrs. Barnett
Lanner on 9/28/89. Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

Joseph A. Connors III
P. O. Box 5838
McAllen, TX 78502

MAIL TO:

11/11/11